Supreme Court, U.S.
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No. 06-528

In The
Supreme Court of the United States

TOM LUNDEEN, *et al.*,

Petitioners,

v.

CANADIAN PACIFIC RAILWAY COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL ALAN LEVY
(*Counsel of Record*)
BONNIE I. ROBIN-VERGEER
PUBLIC CITIZEN
LITIGATION GROUP
1600 – 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

GEORGE G. ECK
SARAH A. HERMAN
KRISTY L. ALBRECHT
DORSEY & WHITNEY LLP
51 North Broadway,
Suite 402
P.O. Box 1344
Fargo, ND 58107-1344
(701) 235-6000

COLLIN P. DOBROVOLNY
BRYAN L. VAN GRINSVEN
MCGEE, HANKLA, BACKES
& DOBROVOLNY P.C.
15 2nd Avenue W.
Wells Fargo Bank Center,
Suite 305
P.O. Box 998
Minot, ND 58702-0998
(701) 852-2544

Attorneys for Petitioners
October 16, 2006

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QUESTIONS PRESENTED

1. Can a federal statute that creates no cause of action for the injured party provide a basis for federal jurisdiction and removal of a state tort claim filed in state court under the doctrine of complete preemption?

2. Does the Federal Railroad Safety Act ("FRSA") authorize complete preemption of state-law tort claims over railroad accidents, thereby conferring jurisdiction on federal courts, where the FRSA contains no private right of action for persons injured by a railroad's acts or omissions?

PARTIES TO THE PROCEEDINGS BELOW

The following individuals were plaintiffs in the district court and appellees in the court of appeals, and are petitioners here: Tom and Nanette Lundeen, individually and as parents of their minor children Molly and Michael Lundeen; Melissa Todd; Irene Clore Korgel; Trent Westmeyer and Randi Lou Westmeyer; Darla M. Just; Mary Beth Gross, individually, and Mary Beth Gross on behalf of, and as parent and natural guardian of Brett Gross; Mark Nesbit and Sandra Nesbit; LeRoy Slorby; Ray Lokoduk; JoAnn Flick; Wilfred Dahly and Geraldine Dahly; Marilyn Carlson; Gerald Wickman; Dion Darveaux, individually, and Brenda Darveaux, individually, and Dion Darveaux and Brenda Darveaux on behalf of, and as parents and natural guardians of Kendall Darveaux, a minor; Shelly Hingst; Bobby Smith and Mary Smith; Richard Muhlbradt; Doug Weltzin; Nathan Freeman, individually and Nichole Freeman, individually, and Nathan Freeman and Nichole Freeman on behalf of, and as parents and natural guardians of Ashlyn Freeman, a minor; Charlotte Goerndt; Leo Gleason; Judy Deutsch, individually, and Judy Deutsch on behalf of, and as parent and natural guardian of Tyrone Deutsch, a minor; Denise Duchsherer, Leo Duchsherer, and Joshua Duchsherer; Larry Crabbe and Carol Crabbe; Rebecca M. Behnkie on behalf of, and as parent and natural guardian of Nathaniel Behnkie, a minor; Charles Swenson and Sandra Swenson; Larry Schafer, individually, and Tami Schafer, individually, and Larry Schafer and Tami Schafer on behalf of, and as parents and natural guardians of Jenna Schafer, a minor; John Salling, individually, and Lorenda Poissant Salling, individually, and Lorenda Poissant Salling on

PARTIES TO THE PROCEEDINGS BELOW – Continued

behalf of, and as parent and natural guardian of Sebastian Poissant, a minor; Rachelle Todosichuk; Lonnie Shigley; and Richard McBride and Linda McBride.

The following entities were defendants in the district court and appellants in the court of appeals, and are respondents here: Canadian Pacific Railway Company; Canadian Pacific Limited; Canadian Pacific Railway Limited; and Soo Line Railroad Company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet App. 1a to 29a) is reported at 447 F.3d 606. The opinions of the United States District Court for the District of Minnesota, initially denying the motion to remand (Pet. App. 30a to 42a), and then granting the motion for remand following amendment of the complaint (Pet. App. 43a to 52a), are respectively reported at 342 F. Supp. 2d 826 and 2005 WL 563111.

JURISDICTION

The decision of the United States Court of Appeals was issued on May 16, 2006. Pet. App. 20a. A timely petition for rehearing en banc was denied on July 18, 2006. Pet. App. 53a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 28 U.S.C. §§ 1331 and 1441 and of the Federal Railroad Safety Act, 49 U.S.C. §§ 20101 *et seq.*, are set forth at Pet. App. 54a to 60a.

STATEMENT

A. Introduction

For more than a century, persons injured by railroads have brought suits in state court under state-law theories of liability. These tort claims went forward based upon

failures to meet standards set under either federal law or state law. In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA") "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. After that enactment, plaintiffs continued to bring their state tort claims in state court, again either based upon violations of the standards set in federal law, o where federal law does not cover the issue, based upon state-law standards.

In a decision that radically upsets the settled jurisdictional and substantive framework, the court below held that, despite the absence of any cause of action at all under the FRSA, railroad track inspection claims are subject to the complete preemption doctrine and therefore must be removed to federal court. That holding, which conflicts with the decisions of this Court and those of numerous other courts of appeals, means that causes of action that historically have been brought against railroads in state courts may only be brought in federal court. Indeed, in the wake of the decision below, respondent has removed approximately 150 cases from state court to federal court, asserting that all claims against the railroad must be heard in federal court under the complete preemption doctrine. Under the Eighth Circuit's holding, victims of train derailments, like the tragic occurrence here, will be channeled to federal court only to be told that they have no remedy at all. Congress intended no such result when enacting the FRSA. Because the Eighth Circuit's decision deepens and widens the conflict among the circuits on complete preemption and is contrary to this Court's decisions, the petition should be granted and the decision below should be reversed.

B. Background of This Case

In the early morning hours of January 18, 2002, a freight train derailed 31 of its 112 cars on track owned and maintained by respondent Soo Line Railroad Company (also known as Canadian Pacific Railway), about a half mile from the city limits of Minot, North Dakota. Twelve tank cars, containing liquefied anhydrous ammonia, ruptured or were damaged, resulting in the release of 220,000 gallons of anhydrous ammonia into the atmosphere and creating a toxic cloud that blanketed the city of Minot. One resident, John Grabinger, died from exposure to the ammonia; a multitude of others suffered serious, long-term injuries to their lungs, eyes and respiratory systems.

On June 28, 2004, petitioners Tom and Nanette Lundeen, individually and as parents of their minor children Molly and Michael Lundeen, sued respondent Soo Line, which owns, installed, inspected and maintained the track at issue, along with its parent, respondent Canadian Pacific Railway Company, and other subsidiaries, including respondents Canadian Pacific Limited, and Canadian Pacific Railway Limited (collectively, respondents are identified as "CP Rail"). The action was filed in Minnesota state court, the Hennepin County District Court, where Soo Line is incorporated and has its principal place of business.[1] Petitioners sought damages, alleging in several

[1] Similar cases were brought on behalf of 49 other plaintiffs, whose names are set forth above in the Parties to the Proceedings Below. Like the Lundeens' case, each of these cases was removed to federal district court and subsequently remanded to state court; each of the remands was appealed, and rehearing en banc sought after the court of appeals reversed. By consent of both sides, *Lundeen* was treated as the lead case and the outcome of all the other cases was dependent on *Lundeen*.

(Continued on following page)

counts that respondents' flawed maintenance policies were responsible for the accident and hence for petitioners' injuries. The complaint detailed several respects in which respondents' track was defective under well-established standards. It asserted that respondents had deliberately cut back track inspection efforts to save money. It also alleged that these failings, coupled with the excessive speed at which the train was being operated by respondents, were responsible for the accident and for petitioners' injuries.

At the time suit was filed, CP Rail was defending about 35 cases arising out of the Minot derailment in the same state court. Several of those cases had previously been removed to the United States District Court for the District of Minnesota but were remanded to Hennepin County District Court. Numerous other cases stemming from the Minot derailment were subsequently filed in Hennepin County court. The Hennepin County court established a master file as a repository for all filings relating to the derailment cases, and appointed a special master to administer pretrial proceedings.

C. Proceedings in the District Court

On July 15, 2004, respondents removed the Lundeens' action to the District of Minnesota, asserting that the district court had federal question jurisdiction under 28 U.S.C. § 1331. The notice of removal cited references in the complaint to the rules and regulations of the Federal

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See Pet App. 1a-17a, 39a-40a, 50a. Similarly, in this Court, all 53 original plaintiffs join this petition, but petitioners are identified as the Lundeens for brevity's sake.

Railroad Administration, and the Count III claim that respondents had "violated applicable state law . . . as well as United States law," to show that petitioners had brought federal claims in their state court suit. The Lundeens promptly moved to remand to state court, arguing that their references to such legal standards to show duties that had been violated under state tort law did not amount to bringing federal claims under *Merrell-Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986). The Lundeens also pointed to previous decisions of the federal district court, remanding other suits arising from the Minot derailment, because the court had expressly rejected the argument that preemption by the Federal Railroad Safety Act permitted removal. The Lundeens argued that respondents were raising the same, previously rejected argument. In response, respondents argued that the only basis for removal was the mention of federal standards in the state court complaint; respondents expressly disclaimed any reliance on the complete preemption doctrine as a basis for removal or for federal court jurisdiction.

The district court agreed with respondents that the passing reference in Count III of the complaint to "United States law" as having been violated, with the resultant release of ammonia, was properly construed as reflecting reliance on the federal environmental laws, and hence decided that removal was proper because the complaint arose, at least in part, under federal law. Pet. App. 35a-37a. The Lundeens then sought leave to amend their complaint to dismiss Count III and to remand the case because, once amended, the complaint would no longer include any claims arising under federal law. Respondents argued, however, that remand should be denied because, both by suing in Minnesota where respondents were

incorporated and headquartered instead of in North Dakota where the accident had occurred, and by first bringing a claim that invoked "United States law" and then dismissing that claim, petitioners had been engaged in "forum shopping" which, according to respondents, provided an appropriate basis for denial of a discretionary remand under *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988). The district court, however, agreed with the Lundeens that, given the elimination of Count III from the complaint, the pendency in state court of other cases arising from the same derailment, and the potential for conflict between state and federal cases, the case should be remanded. Pet. App. 46a-47a.

D. Proceedings in the Court of Appeals

Respondents appealed to the United States Court of Appeals for the Eighth Circuit, arguing that the district court had abused its discretion in allowing the complaint to be amended, and had further abused its discretion under *Carnegie-Mellon v. Cohill* and 28 U.S.C. § 1367 by remanding to state court. Respondents justified these arguments by raising the same concerns about forum shopping that they had presented to the district court. Respondents also argued that their federal preemption defense would be an important issue in the case, providing an additional reason to retain supplemental jurisdiction under 28 U.S.C. § 1367. Respondents did not contend that the case still arose under federal law following dismissal of Count III. However, following oral argument, the court sua sponte directed the parties to file supplemental briefs addressing, among other things, whether respondents' intended defense of preemption by the FRSA might provide

a basis for federal jurisdiction under a theory of complete preemption.

In their supplemental brief, respondents reversed ground. Even though, in the district court, they had expressly disavowed complete preemption as a ground for removal, they now argued that what makes the preemptive force of a statute "complete" for the purpose of removal jurisdiction is how "powerful" the preemption is. Supp. Br. at 2-4. Respondents also argued that the FRSA broadly preempts all of petitioners' claims. *Id.* at 5-7, 14-20. Therefore, respondents contended, the very fact that the FRSA preempts claims was itself sufficient to justify its preemptive force as being not merely defensive but "complete," and thus sufficient to provide federal jurisdiction. According to respondents, state courts tend to have too parochial a focus to be trusted with the application of the FRSA preemption defense. *Id.* at 9-10. Moreover, respondents pointed to the Eighth Circuit's previous decision in *Peters v. Union Pacific RR Co.*, 80 F.3d 257 (8th Cir. 1996), which had held that the FRSA completely preempted a locomotive engineer's state-law conversion action, contesting the railroad's refusal to return his engineer's certification.

The Lundeens argued in their supplemental brief, however, that a hallmark of complete preemption is not the "force" of the preemption, but whether Congress has created a federal cause of action it intended to be exclusive, such that any state-law claim asserted was not merely preempted but necessarily transformed into a federal one. Moreover, if, as under the FRSA, the federal statute creates only a regulatory scheme that is enforced primarily through agency rule-making without the creation of any federal cause of action, let alone an exclusive

one, preemption is necessarily only a federal defense that is to be raised in either state or federal court, depending on where the claim has been brought. That defense does not, however, provide a basis for federal jurisdiction. Because FRSA did not create a federal cause of action, the Lundeens argued, it did not create federal jurisdiction as a matter of "complete" preemption.

The court of appeals reversed. It began by stating that, even though respondents had not raised the issue of complete preemption on appeal, a question of subject matter jurisdiction could be raised at any time, including possible grounds for the presence of subject matter jurisdiction as well as grounds for questioning subject matter jurisdiction. Pet. App. 21a. The court noted that preemption is a question of congressional intent, *id.*, and that Congress' purported intention to ensure national uniformity on issues of railroad safety "evince[s] a total preemptive intent." *Id.* 23a, quoting *Peters*. The panel then reviewed the Eighth Circuit's two previous decisions on the issue of FRSA complete preemption, *Peters*, *supra*, and *Chapman v. Lab One*, 390 F.3d 620 (8th Cir. 2004), the latter of which held that common-law claims arising from deficient drug-testing of employees were not preempted by the FRSA's own drug-testing regulations. In both cases, the court noted, the decisions on whether the FRSA preempted state law, and on whether there was "complete preemption," were treated as being the same determination. Pet. App. 23a-25a. The court acknowledged that the FRSA did not create a private right of action, but found that to be of no moment in the complete preemption analysis. Pet. App. 25a n.4.

The court then turned to respondents' argument that the FRSA's track inspection regulations preempted petitioner's state-law claims based on negligent track inspections. The court reasoned that, because the regulations of the Federal Railroad Administration ("FRA") prescribe track inspection protocols, provide for federal and state inspectors to determine whether railroads have met their inspection obligations, and authorize civil administrative penalties for violations, the FRA regulations are intended to prevent negligent track inspection and leave no room for state-law causes of action. Pet. App. 28a. The panel opinion noted, in closing, that "absent en banc review we are bound by our decision in *Peters* to find complete, jurisdictional preemption." *Id.*

Petitioners sought rehearing *en banc*, arguing that each of this Court's previous complete preemption decisions had involved statutes that provided an exclusive federal cause of action, and citing cases from numerous other circuits holding that the existence of an alternate federal cause of action within the jurisdiction of the federal courts is a necessary precondition for "complete preemption." The Lundeens also noted the disarray into which the panel's opinion had thrown the numerous state court cases arising out of the Minot derailment, some of which had already proceeded to trial following the remand, because respondents had not sought a stay from the court of appeals pending their appeal of the decision to remand. The full court of appeals directed a response to the petition but denied rehearing. The only two active judges on the panel below – Judge Bye, the authoring judge, and Judge Smith – voted to rehear the case *en banc*. Pet. App. 53a.

REASONS FOR GRANTING THE WRIT

The Court Should Grant Review to Resolve Conflicts Among the Circuits and Other Lower Courts About Whether the Existence of a Federal Cause of Action Is a Necessary Condition for Establishing Federal Jurisdiction Based on Complete Preemption.

The decision below sharpens an ongoing conflict among the lower courts about the kinds of federal laws that provide a basis for complete preemption of state-law claims, thereby rendering the state claims removable to federal court. The lower courts are deeply divided on the question whether a claim of federal jurisdiction based on complete preemption can succeed when the federal statute at issue does not itself create a federal cause of action that "supplants" the preempted state court remedy. Moreover, the lower courts are divided specifically about whether the FRSA supports removal of state tort claims based on complete preemption. The Court should grant certiorari to resolve this fundamental dispute over federal destruction of state court jurisdiction.

A. The Decision Below Wrongly Applies the Complete Preemption Doctrine – In Conflict With This Court's Decisions

It is settled law that the affirmative defense of preemption does not confer federal jurisdiction. "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. . . . A defense is not part of a plaintiff's properly pleaded statement of his or her claim." *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998) (citations omitted).

Indeed, no defense – preemption or otherwise – provides federal question jurisdiction. "[A] case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987). *Accord Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 (1983). Even the extremely broad preemption of the Employee Retirement Income Security Act ("ERISA") "without more, does not convert a state claim into an action arising under federal law." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64 (1987). Accordingly, the normal rule is that a federal-law defense to a state-law claim, including the defense of preemption, must be litigated in state court if the plaintiffs have brought their claims in state court, subject, of course, to review by this Court on certiorari from a final state court decision.

There are "only two circumstances" where a state claim may be removed to federal court: "when Congress expressly so provides, such as in the Price-Anderson Act [authorizing removal of tort claims arising from nuclear accidents], or when a federal statute wholly displaces the state-law cause of action through complete preemption." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). This Court has identified only three federal statutes that wholly displace state-law claims rather than simply defeating them – section 301 of the Labor Management Relations Act ("LMRA"), *Avco Corp. v. Machinists Lodge 735*, 390 U.S. 557 (1968); the National Bank Act, 12 U.S.C.

§§ 85 and 86, *Beneficial*, *supra*; and section 502 of the ERISA, *Metropolitan Life*, *supra*.[2] The defining characteristics, the Court has made clear, are whether "the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial*, 539 U.S. at 8.

Thus, as applied in this Court's decisions, complete preemption is a jurisdictional doctrine. It occurs only where Congress has created an exclusive federal cause of action to enforce rights created by a federal statute. If a plaintiff brings a state-law claim that falls within the scope of the exclusive federal action, a federal court recharacterizes the claim as a federal claim, and federal question jurisdiction attaches. *Beneficial*, 539 U.S. at 9. Thus, a federal cause of action is the first prerequisite to complete preemption, and the second is whether Congress

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[2] In special circumstances not applicable here, a federal court may have federal question jurisdiction over a state-law claim that depends on the construction of a federal statute that does not itself create a cause of action, where a disputed substantial question of federal law is a necessary element and removal will not upset the congressionally approved balance of federal and state judicial responsibilities. *See Grable & Sons Metal Products v. Darue Engineering & Mfg.*, 545 U.S. 308, 125 S.Ct. 2363 (2005) (holding national interest in providing a federal forum for federal tax litigation is sufficiently strong to support the exercise of federal question jurisdiction over state-law claim involving substantial issue of federal title law). Explaining and distinguishing *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986), *Grable* observed that state-law tort claims involving violations of federal statutes will not fit this narrow exception. *See id.* at 2370-71. Moreover, in a *Grable*-type case, the federal interest does not displace the state-law claim and warrant a finding of complete preemption. The court of appeals directed the parties to brief the application of *Grable* to this case, but did not address that issue in its decision. Accordingly, this petition does not address it further.

charged the federal courts with exclusive jurisdiction to rule on the claims.

Both of those elements are absent here. Nowhere does the FRSA confer an exclusive federal private right of action for persons injured by railroads. The court below neither cited *Beneficial National Bank* nor identified anywhere in the FRSA where Congress intended to eliminate state-law remedies that have existed for more than a century and to replace those remedies with a federal cause of action. What the Eighth Circuit did below was to treat the affirmative defense of substantive preemption under the FRSA as giving rise to "complete preemption" of the type that confers exclusive federal jurisdiction over claims. Nothing in the FRSA or this Court's decisions countenances that result.

B. The Eighth Circuit's Approach Conflicts With the Decisions of Other Circuits.

In seeking to identify the essential characteristics that confine complete preemption claims to a narrow class of cases, a deep split has developed among the courts of appeals that has now been widened by the Eighth Circuit in this case. A clear majority of circuits has rejected the notion accepted below that a regulatory scheme alone is sufficient for the invocation of the complete preemption doctrine. Those courts have assessed the removal of claims pursuant to preemption defenses under a large variety of federal statutes and held that a federal statute cannot effectuate the "complete preemption" that allows removal of state-law claims if Congress did not create a federal cause of action that substitutes for the state cause of action that the plaintiff would otherwise have. For example, the

Fourth Circuit rejected complete preemption under sections 7 and 8 of the National Labor Relations Act, explaining "the sine qua non of complete preemption is a preexisting *federal* cause of action that can be brought in the district courts." *Lontz v. Tharp*, 413 F.3d 435, 442 (4th Cir. 2005). The Seventh Circuit similarly explained this precondition of a federal cause of action in *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 789 (7th Cir. 2002). The court stated, "Logically, complete preemption would not be appropriate if a federal remedy did not exist in the alternative. . . . Preemption is what wipes out state law, but the foundation for removal is the creation of federal law to replace state law." *Id.* at 789 (internal quotes and cites omitted). A distinct majority of circuits agree with the analysis in *Lontz* and *Rogers*.[3] In these cases, unlike the approach taken below, the absence of a federal cause of

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[3] *E.g.*, *Felix v. Lucent Technologies*, 387 F.3d 1146, 1158 (10th Cir. 2004) (ERISA); *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 839 (9th Cir. 2004) (Telecommunications Act of 1996); *Briarpatch Ltd. v. Phoenix Pictures*, 373 F.3d 296, 304-305 (2d Cir. 2004) (Copyright Act); *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002) (Airline Deregulation Act); *Johnson v. Baylor University*, 214 F.3d 630, 631-634 (5th Cir. 2000) (Pilot Records Sharing Act); *American Policyholders Ins. Co. v. Nyacol Products*, 989 F.2d 1256, 1263 (1st Cir. 1993) (CERCLA); *Railway Labor Execs Ass'n v. Pittburgh & Lake Erie RR Co.*, 858 F.2d 936, 942 (3d Cir. 1988) (Railway Labor Act); *Williams v. Midwest Express Airlines*, 315 F. Supp. 2d 975, 979 (E.D. Wis. 2004) (Airline Deregulation Act); *Burton v. Southwood Door Co.*, 305 F. Supp. 2d 629, 637-638 (S.D. Miss. 2003) (Federal Omnibus Transportation Employee Testing Act). *See also Hudson Ins. Co. v. American Elec. Corp.*, 957 F.2d 826, 830 (11th Cir. 1992) (in federal court action for declaratory judgment that insurance policy did not provide CERCLA coverage, court rejected argument that suit to compel coverage would be completely preempted by CERCLA because CERCLA does not create cause of action for insurance coverage).

action was critical to the court's determination that the complete preemption doctrine did not apply.

The view of the great majority of circuits is exemplified by their cases – and, indeed, decisions from this Court – involving preemption under ERISA. Courts routinely hold that, because "a vital feature for complete preemption is the existence of a federal cause of action that replaces the state cause of action," complete preemption extends only to claims for relief that could have been brought under ERISA section 502, *King v. Marriott Int'l*, 337 F.3d 421, 425 (4th Cir. 2003), and where the state plaintiff would have had standing to file under section 502.[4] However, when ERISA's preemptive force comes only from conflict with ERISA's policies, this Court has long held that there is no replacement of state-law claims by section 502, and that the preemption is only conflict preemption that does not support removal. *Franchise Tax Bd.*, 463 U.S. at 25-27.

As the Ninth and Tenth Circuits have held, the fact that the federal statute may give regulatory authority to a federal agency, which in turn has the authority to institute a civil action in district court, does not mean that complete preemption applies, even if the regulatory scheme is established as the exclusive means of enforcement in the area. *Opera Plaza v. Hoang, supra*, 376 F.3d at 838-839; *Schmeling v. NORDAM*, 97 F.3d 1336, 1342-1344 (10th Cir. 1996). Otherwise, every case of claimed "field preemption" could support removal of the allegedly preempted

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[4] *Pascack Valley Hospital v. Local 464A UFCW Welfare Reimb. Plan*, 388 F.3d 393, 400 (3d Cir. 2004); *Felix v. Lucent Technologies*, 387 F.3d 1146, 1158 (10th Cir. 2004).

state claims to federal court. But complete preemption is not "a crude measure of the breadth of the preemption (in the ordinary sense) of a state law by a federal law, but rather . . . a description of the specific situation in which a federal law not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action, thereby manifesting Congress's intent to permit removal." *Schmeling*, 97 F.3d at 1342, *quoted in Lucent Technologies*, *supra*, 387 F.3d at 1156-1157. Such decisions comport with the theoretical basis for the doctrine of complete preemption – that Congress has created a cause of action that actually displaces the state cause of action and "converts" it into a federal cause of action within the district court's original jurisdiction. *Aetna Health v. Davila*, 542 U.S. 200, 209 (2004).

A minority of lower court decisions agrees with the Eighth Circuit that complete preemption may exist even in the absence of a federal cause of action. Those courts **have** found complete preemption by a federal statute that did not create a private right of action over which district courts would have had original jurisdiction. For example, in a different case, the Eighth Circuit held that the Railway Labor Act effectuates complete preemption of some state claims that are arguably based on an interpretation of a collective bargaining agreement ("CBA") in the railway or airline industries, even though the statute does not create a federal cause of action.[5] Many other circuits,

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[5] *Gore v. TWA*, 210 F.3d 944, 949-950 (8th Cir. 2000); *Deford v. Soo Line*, 867 F.2d 1080, 1086 (8th Cir. 1989). *See also, e.g., Anderson v. American Airlines*, 2 F.3d 590, 595 (5th Cir. 1993) (dictum that RLA can effectuate complete preemption, but removal reversed because particular state-law claims at issue did not require interpretation of CBA).

however, hold in conflict with the Eighth Circuit that the RLA does not provide a basis for complete preemption of state-law claims, reasoning that, unlike the LMRA, the RLA does not create a federal cause of action to enforce contracts.[6]

Similarly, the Sixth Circuit has upheld complete preemption in a case presenting claims that a labor union engaged in age discrimination in violation of state law by enforcing a rule that persons over the age of sixty-five could not run for union office, and that union officials defamed the plaintiff official when he tried to run in violation of that union rule. *Davis v. UAW*, 392 F.3d 834, 838-840 (6th Cir. 2004), *cert. pending*, No. 05-107. There, the court held that provisions of the Labor Management Reporting and Disclosure Act giving the Labor Department exclusive jurisdiction over union elections authorized complete preemption.

This disagreement among the lower courts about whether complete preemption can be found when a federal statute does not create a federal cause of action is both steadily growing and firmly entrenched, as shown by the Eighth Circuit's refusal to grant en banc review in the face of a petition that showed how generally isolated its position has become. Because this conflict involves fundamental principles of federal jurisdiction and of the relation between federal and state courts, it warrants prompt resolution by this Court.

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[6] *E.g.*, *Geddes v. American Airlines*, 321 F.3d 1349, 1354-1355 (11th Cir. 2003); *Railway Labor Execs Ass'n v. Pittburgh & Lake Erie RR Co.*, 858 F.2d 936, 942 (3d Cir. 1988); *Price v. PSA*, 829 F.2d 871, 876 (9th Cir. 1987).

C. The Decision Below Also Presents A Square Conflict Over Whether the FRSA Provides for Complete Preemption of State Tort Claims.

This case presents a particularly apt vehicle for resolving the conflict because there is also a split among the lower courts about the specific question whether there is complete preemption under the FRSA when state tort actions are brought over railroad accidents.

1. In most circuits, state court lawsuits presenting tort claims allegedly preempted by the FRSA have been held removable or not based solely on whether there was diversity of citizenship or some other basis for federal subject matter jurisdiction, without any suggestion that the FRSA preemption defense could provide a basis for removal.[7] The *en banc* Fifth Circuit, in the course of reversing a district court's refusal to remand a diversity case based on a ruling of improper joinder, squarely stated, albeit without extended discussion, that FRSA preemption is a federal defense and hence not a basis for removal. *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568, 575-576 (5th Cir. 2004) (*en banc*). Several district courts have joined *Smallwood*, expressly rejecting arguments of complete preemption under the FRSA, which would allow

[7] *Strozyk v. Norfolk Southern Corp.*, 358 F.3d 268, 270 (3d Cir. 2004); *Macfarlane v. Canadian Pacific Ry. Co.*, 278 F.3d 54, 56 (2d Cir. 2002); *Rushing v. Kansas City Southern Ry. Co.*, 185 F.3d 496, 502 (5th Cir. 1999); *Ingram v. CSX Transp.*, 146 F.3d 858, 860-863 (11th Cir. 1998). None of these decisions expressly addressed the issue of complete preemption. However, as the court below held, subject matter jurisdiction must be considered sua sponte, and hence any ruling requiring remand for lack of diversity implicitly holds that FRSA preemption is a defense rather than an independent basis for removal.

removal of state tort claims.[8] And the Seventh Circuit, addressing the analogous issue of preemption under the Locomotive Inspection Act ("LIA"), has held that the railroad's claim of complete preemption founders on the fact that nothing in the LIA indicates that Congress intended to create a federal forum for the plaintiff's claims. *Adkins v. Illinois Cent. R. Co.*, 326 F.3d 828, 835 (7th Cir. 2003). In sum, the Eighth Circuit's FRSA holding is in conflict with a growing number of lower courts about whether the FRSA preemption defense provides federal question jurisdiction based on the principle of complete preemption. This case is, therefore, an excellent vehicle for deciding whether the absence of a federal cause of action is fatal to a claim of complete preemption.[9]

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[8] *Sullivan v. BNSF Ry. Co.*, ___ F. Supp. 2d ___, 2006 WL 2390330 (D. Ariz. Aug. 17, 2006); *Kelley v. Norfolk & Southern Ry. Co.*, 80 F. Supp. 2d 587, 590-592 (S.D. W.Va. 1999); *Duncan v. Kansas City Southern R. Co.*, 1998 WL 35069621 (W.D. La. April 7, 1998). *See also Civil City of South Bend, Ind. v. Consolidated Rail Corp.*, 880 F. Supp. 595, 598-599 (N.D. Ind. 1995) (no federal question jurisdiction of city's declaratory judgment action seeking to establish that its ordinances are not preempted by the FRSA).

[9] The one case outside the Eighth Circuit that was cited by the court below in support of its determination of complete preemption was *Rayner v. Smirl*, 873 F.2d 60, 65 (4th Cir. 1989), which held that the FRSA's whistleblower protections caused complete preemption of the state whistleblower claims of a railroad employee. Notably, however, FRSA **does** create a specific federal remedy for individual employees, and the Fourth Circuit specifically relied on that federal remedy in finding complete preemption. *See id.* at 63-67 (examining 45 U.S.C. § 441 and holding Congress intended it to be the exclusive remedy for the plaintiff). The Fourth Circuit's decision in *Lontz v. Tharp*, *supra*, shows that the Fourth Circuit is firmly of the view that the existence of a federal cause of action is one of the preconditions for complete preemption.

2. Even apart from the fact that the FRSA does not provide a federal cause of action that could supplant the state cause of action, there is another reason why FRSA preemption would make a particularly unsuitable candidate for complete preemption – the fine lines and particularized factual determinations that often divide the preempted tort claim from the non-preempted claim. The FRSA is unlike section 301 of the Labor-Management Relations Act or section 502 of ERISA, under which there is complete preemption where a plaintiff with a federal cause of action under those provisions seeks to enforce a collective bargaining agreement or benefit plan. The existence vel non of FRSA substantive preemption may depend on the case-specific factual determination of whether there was an individual hazard that imposed a duty to slow or to stop the train,[10] or whether the problem was that vegetation at a crossing blocked a sign (preempted) or blocked the motorist's view of oncoming trains (not preempted),[11] or whether there is federal funding for a particular crossing, a fact that is not always clear at the outset of a case and may even not be finally determined until trial.[12] Indeed, the facts about whether federal funds

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[10] *CSX Transp. v. Easterwood*, 507 U.S. 658, 674 n.15 (1993); *Alcorn v. Union Pacific RR Co.*, 50 S.W.2d 226, 241-242 (Mo. 2001) (citing illustrative cases).

[11] *Shanklin v. Norfolk Southern Ry. Co.*, 369 F.3d 978, 986-988 (6th Cir. 2004); *Clark v. Illinois Cent. R. Co.*, 794 So.2d 191, 195-196 (Miss. 2001).

[12] *E.g.*, *Anderson v. Wisconsin Cent. Transp. Co.*, 327 F. Supp. 2d 969, 973-974 (E.D. Wis. 2004), *Richardson v. Norfolk Southern Ry. Co.*, 923 So.2d 1002, 1008 (Miss. 2006); *Ball v. Burns & McDonnell*, 883 P.2d 756, 762 (Kan. 1994).

were devoted to the one crossing or device that is at issue in the case is often peculiarly within the knowledge of the railroad, and hence subject to manipulation depending on exactly what claims are made by the plaintiff and which claims prove to be the crucial ones in the litigation. *E.g.*, *Hester v. CSX Transp.*, 61 F.3d 382, 384, 386 (5th Cir. 1995) (railroad took inconsistent positions about whether federal funds were actually used to upgrade the subject crossing). *See also Hart v. Bayer Corp.*, 199 F.3d 239, 244-246 (5th Cir. 2000) (fact that FIFRA contains an anti-preemption provision [as does the FRSA] and that many state claims are not preempted by FIFRA militates against finding complete preemption).

If not only the existence of substantive preemption, but the very forum in which the case is to be litigated, depends on the resolution of such factual questions, a case could be tried in one forum, only to have to be sent to the other forum after the trial or even the appeal resolves one of these factual issues.

Equally dangerous to the orderly resolution of cases through certainty about the proper forum is the fact that, thirteen years after *Easterwood* – the Court's first foray into FRSA preemption – there remain major areas of disagreement among the lower courts about whether particular tort claims are preempted by the FRSA or by its implementing regulations. Lower courts disagree about the application of the term "essentially local safety or security hazard," 49 U.S.C. § 20106(1), such as whether the steepness of a grade or sharpness of a curve,[13] the

[13] *Compare Mononghela Connecting R. Co v. Pennsylvania PUC*, 404 A.2d 1376, 1379 (Pa. 1979) (not preempted) *with Union Pac. R. Co. v. California PUC*, 346 F.3d 851 (9th Cir. 2003) (preempted).

presence of multiple or congested tracks,[14] the urban nature of the tracks or crossing,[15] the malfunctioning of the warning signals,[16] fire danger conditions,[17] or obstructed or poor drainage,[18] render the hazard "essentially local." And yet, according to the Eighth Circuit, the determination of each of these legal questions, at the trial level or on appeal, will determine not only the viability of the claim but also the propriety of the forum.

The Eighth Circuit's "preemption equals jurisdiction" analysis thus creates a practical problem as to the substantive preemption analysis. For example, in the *Lundeen* decision, it resulted in a broad ruling that all track inspections claims are preempted, ignoring the particularized analysis required by this Court in *Easterwood* and the

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[14] *Compare Lavigne v. CSX Tranp.*, 2002 WL 1424808 (Mich. App. 2002), at *10-*12 (not preempted) *with Bakhuyzen v. National Rail Passenger Corp.*, 20 F. Supp. 2d 1113, 1117 (W.D. Mich. 1996) (preempted).

[15] *Compare Stevenson v. Union Pac. R. Co.*, 110 F. Supp. 2d 1086, 1091 (E.D. Ark. 2000), *aff'd in part*, 354 F.3d 739 (8th Cir. 2004) (could avoid preemption if state had regulation on point), and *In re Speed Limit for Union Pac. RR Through City of Shakopee*, 610 N.W.2d 677, 683-684 (Minn. App. 2000) (not preempted) *with Santini v. Conrail*, 505 N.E.2d 832, 835-838 (Ind. App. 1987) (preempted).

[16] *Compare Stone v. CSX Transp.*, 37 F. Supp. 2d 789, 794-797 (S.D. W. Va. 1999) (not preempted) *with Smith v. Norfolk and Western Ry. Co.*, 776 F. Supp. 1335, 1341 (N.D. Ind. 1991).

[17] *Compare State v. Chicago, M. St. P. & P.R. Co.*, 484 P.2d 1146, 1149 (Wash. 1971) (not preempted) *with Conrail v. City of Bayonne*, 724 F. Supp. 320, 330-331 (D.N.J. 1989) (preempted).

[18] *Compare State ex rel. Utilities Com'n v. Seaboard Coast Line R. Co.*, 303 S.E.2d 549, 555 (N.C. 1983) (not preempted) *with Black v. Baltimore and O. R. Co.*, 398 N.E.2d 1361, 1363 (Ind. App. 1980) (preempted).

FRA's decision not to create federal standards as to the inspection of track made of continuous welded rail. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993); 49 C.F.R. § 213.119. Moreover, the analysis assumes that only federal courts are capable of making judgments about whether the FRSA preempts claims. This Court has long held, however, that state courts are fully capable of rendering judgments regarding the substantive preemption of state-law claims. *See, e.g., Kircher v. Putnam Funds Trust*, 126 S.Ct. 2145, 2157 (2006) (noting that state courts are equally competent bodies as federal courts, subject to review by the Supreme Court).

D. There Is Widespread Disarray in the Law of Complete Preemption.

Beyond these more specific problems with the holding below is the general disarray in the law of complete preemption. Commentators have noted the confusing state of the law in this area, *e.g.*, Green, *Complete Preemption – Removing the Mystery from Removal*, 86 Calif. L. Rev. 363, 383 (1998), and a study by the Federal Judicial Code Revision Project of the American Law Institute noted the substantial divisions among the lower federal courts about complete preemption, which have given narrower or broader readings to this Court's opinions in the area:

> The failure of the federal courts to develop a coherent doctrine of removal on grounds of complete preemption threatens basic notions of the limited jurisdiction of the federal courts. While this problem falls short of apocalyptic proportions, it injects an unwholesome degree of unpredictability into the law the district courts must

> apply to determine the removability of pre-empted state law claims.
>
> American Law Institute, *Federal Judicial Code Revision Project: Tentative Draft No. 3* (1999), at 279.

The ALI singled out the Eighth Circuit as being especially profligate in finding complete preemption. *Id.* at 295-298. *See also Jones v. Bankboston, N.A.*, 115 F. Supp. 2d 1350, 1356 (S.D. Ala. 2000) (decrying "the Eighth Circuit's lenient test for complete preemption"). Indeed, in *Husmann v. Trans World Airlines*, 169 F.3d 1151, 1152-1153 (8th Cir. 1999), the Eighth Circuit held that the Warsaw Convention effects complete preemption of state-law personal-injury claims filed over accidents occurring during international travel, citing several decisions from other circuits that merely held that the Convention preempts state tort claims brought in federal court, without any further discussion of the propriety of removal. In effect, with its decisions in *Husmann, Deford v. Soo Line*, 867 F.2d 1080, 1086 (8th Cir. 1989), and the decision below, the Eighth Circuit has abolished the distinction between substantive preemption and complete preemption.

Where complete preemption applies, it has the extraordinary effect of turning a state-law case into a federal lawsuit. Without strict limits on the doctrine, there have been, and will continue to be, an "ever-increasing number of cases and contexts" in which complete preemption is invoked. 14B Wright, Miller & Cooper: *Federal Practice & Procedure* § 3722.1, at 508 (1998). There should be no uncertainty regarding the conditions under which that may properly happen, but the square and ongoing conflict among the lower courts described above shows that there is. This Court should resolve that conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL ALAN LEVY
(*Counsel of Record*)
BONNIE I. ROBIN-VERGEER
PUBLIC CITIZEN LITIGATION GROUP
1600 – 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

GEORGE G. ECK
SARAH A. HERMAN
KRISTY L. ALBRECHT
DORSEY & WHITNEY LLP
51 North Broadway, Suite 402
P.O. Box 1344
Fargo, ND 58107-1344
(701) 235-6000

COLLIN P. DOBROVOLNY
BRYAN L. VAN GRINSVEN
MCGEE, HANKLA, BACKES &
DOBROVOLNY P.C.
15 – 2nd Avenue W.
Wells Fargo Bank Center,
Suite 305
P.O. Box 998
Minot, ND 58702-0998
(701) 852-2544

Attorneys for Petitioners

October 16, 2006

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-1918

Tom Lundeen, individually; Nanette Lundeen, and as parents and natural guardians of Molly Lundeen, a minor, and Michael Lundeen,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1920

Appeals from the United States District Court for the District of Minnesota.

John Salling, individually; Lorenda Poissant Salling, individually, and on behalf of, and as parent and natural guardian of Sebastian Poissant, a minor,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1922

Dion Darveaux, individually, on behalf of, and as parent and natural guardian of Kendall Darveaux, a minor; Brenda Darveaux, individually, on behalf of, and as a parent and natural guardian of Kendall Darveaux, a minor,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad

Company, *
*
Defendants - Appellants. *

No. 05-1923

Larry Schafer, individually, and on behalf of, and as parent and natural guardian of Jenna Schafer, a minor; Tami Schafer, individually, and on behalf of, and as parent and natural guardian of Jenna Schafer, a minor, *
*
Plaintiff - Appellee, *
*
v. *
*
Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company, *
*
Defendants - Appellants. *

No. 05-1924

Gerald Wickman *
*
Plaintiff - Appellee, *
*
v. *
*
Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *
*
Defendants - Appellants. *

No. 05-1925

Charles Swenson; Sandra Swenson, *
*
Plaintiffs - Appellees, *
*
v. *
*
Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *
*
Defendants - Appellants. *

No. 05-1926

Rebecca Behnkie, individually, and on behalf of, and as parent and natural guardian of Nathaniel Behnkie, a minor,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1927

Marilyn Carlson,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1928

Larry Crabbe; Carol Crabbe,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1929

Wilfred Dahly; Geraldine Dahly, *

*

Plaintiffs - Appellees, *

*

v. *

*

Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *

*

Defendants - Appellants. *

No. 05-1930

Denise Duchsherer; Leo Duchsherer; *
Joshua Duchsherer, *

*

Plaintiffs - Appellees, *

*

v. *

*

Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *

*

Defendants - Appellants. *

No. 05-1931

Judy Deutsch, individually, and on behalf of, and as natural guardian of Tyrone Deutsch, a minor,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1932

Jo Ann Flick,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1933

Leo Gleason,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1934

Charlotte Goerndt,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1935

Mary Beth Gross, individually, and on behalf of, and as parent and natural guardian of Brett Gross, a minor,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1936

Darla M. Just,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1937

Irene Clore Korgel,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific

Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1938

Richard McBride; Linda McBride,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1939

Richard Muhlbradt,

Plaintiff - Appellee,

v. *
*
Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *
*
Defendants - Appellants. *

No. 05-1940

Lonnie Shigley, *
*
Plaintiff - Appellee, *
*
v. *
*
Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *
*
Defendants - Appellants. *

No. 05-1941

Bobby Smith; Mary Smith,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1942

Rachelle Todosichuk,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1943

Shelly Hingst, *

*

Plaintiff - Appellee, *

*

v. *

*

Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *

*

Defendants - Appellants. *

No. 05-1944

Nathan Freeman, individually, and on *
behalf of, and as parents and natural *
guardians of Ashlyn Freeman, a minor; *
Nicole Freeman, individually, and on *
behalf of, and as parents and natural *
guardians of Ashlyn Freeman, a minor *

*

Plaintiffs - Appellees, *

*

v. *

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company, *

Defendants - Appellants. *

No. 05-1945

Doug Weltzin, *

Plaintiff - Appellee, *

v. *

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company, *

Defendants - Appellants. *

No. 05-1946

Melissa Todd, *

*

Plaintiff - Appellee, *

*

v. *

*

Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *

*

Defendants - Appellants. *

No. 05-1947

Ray Lakoduk, *

*

Plaintiff - Appellee, *

*

v. *

*

Canadian Pacific Railway Company; *
Canadian Pacific Ltd, Sued as Canadian *
Pacific Limited; Canadian Pacific *
Railway Limited; Soo Line Railroad *
Company, *

*

Defendants - Appellants. *

No. 05-1948

Trent Westmeyer; Randi Lou Westmeyer,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1949

Leroy Slorby,

Plaintiff - Appellee,

v.

Canadian Pacific Railway Company;

Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

No. 05-1950

Mark Nisbet; Sandra Nisbet,

Plaintiffs - Appellees,

v.

Canadian Pacific Railway Company; Canadian Pacific Ltd, Sued as Canadian Pacific Limited; Canadian Pacific Railway Limited; Soo Line Railroad Company,

Defendants - Appellants.

Submitted: October 14, 2005
Filed: May 16, 2006

Before BYE, BEAM, and SMITH, Circuit Judges.

BYE, Circuit Judge.

Canadian Pacific Railway Company (CP Rail) appeals the district court's orders allowing the Lundeens to amend their complaint and remanding the case to state court. We reverse and remand.

I

This action was originally filed by the Lundeens against CP Rail in Minnesota state court. They sued for personal injuries and property damages suffered as a result of a CP Rail freight train derailment in North Dakota. CP Rail removed to the United States District Court for the District of Minnesota based on federal question jurisdiction. The Lundeens amended their complaint in an attempt to remove the federal question. The district court declined to exercise its discretionary jurisdiction over what it construed to be remaining state law claims and remanded to state court. CP Rail appealed, challenging the order allowing the Lundeens to amend their complaint and the remand as improper forum shopping. Regardless of the merits of the forum-shopping argument, we note the amended complaint continues to claim, among other things, CP Rail negligently inspected their tracks as shown by failing to comply with the rules and regulations of the Federal Railroad Administration (FRA), and we thus hold the district

court continues to have jurisdiction through complete preemption of the state law claim of negligent inspection.

II

A question of subject-matter jurisdiction may be raised sua sponte at any time. Long v. Area Manager, Bureau of Reclamation, 236 F.3d 910, 916 (8th Cir. 2001) (citation omitted). Generally, a plaintiff can avoid removal to federal court by alleging only state law claims. Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 542 (8th Cir. 1996) (citing Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987)). However, there are exceptions to this general rule. One basis for removal is federal question jurisdiction. See 28 U.S.C. § 1441. A federal question is raised in "those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action *or* that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983) (emphasis added). Additionally "complete" preemption is an exception to the well-pleaded complaint rule and, unlike preemption as a defense, is a basis for federal jurisdiction. Gaming Corp., 88 F.3d at 543.

Congressional intent is the "ultimate touchstone" guiding preemption analysis. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987) (citations omitted). "If the statute contains an express preemption clause, then the statutory construction should center on its plain meaning as the best evidence of Congress's preemptive intent." Peters v. Union Pac. R.R., 80 F.3d 257, 261 (8th Cir. 1996). Here, the Lundeens assert in part CP Rail negligently inspected railroad tracks, so we look to the Federal Railroad Safety Act (FRSA), 49 U.S.C.

§ 20101 et. seq., and the extent to which relevant regulations adopted pursuant to it address negligent track inspection.

The preemptive effect of the FRSA is specified in 49 U.S.C. § 20106[1]:

> Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
> (3) does not unreasonably burden interstate commerce.

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[1] Although the current version of the FRSA's preemption clause is worded slightly differently from the original version, we have noted the two versions are "identical in substance." Cearley v. Gen. Am. Transp. Corp., 186 F.3d 887, 890 n.5 (8th Cir. 1999).

On the one hand, Congress created the FRSA to ensure railroad safety would be "nationally uniform to the extent practicable" and "'[t]hese statutory provisions evince . . . a 'total preemptive intent.'" Peters, 80 F.3d at 262 (quoting Nat'l Ass'n of Regulatory Util. Comm'rs v. Coleman, 542 F.2d 11, 13 (3d Cir. 1976)). On the other hand, the preemption provision is "'employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses.'" Chapman v. LabOne, 390 F.3d 620, 626-27 (8th Cir. 2004) (quoting CSX Transp. v. Easterwood, 507 U.S. 658, 665 (1993)).

This circuit has addressed complete preemption in the context of the FRSA on two occasions: Chapman and Peters. In Peters we found complete preemption: "Congress has expressly preempted state laws affecting railroad safety where the Secretary of Transportation has promulgated regulations," as confirmed by "[t]he FRSA regulations explicitly set[ting] out a comprehensive administrative adjudication system for handling certification disputes," which "directly apply to Peters' [state law] conversion claim."[2] 390 F.3d at 262. Thus, we held,

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[2] The administrative adjudication is described as:

> Pursuant to § 434, the Secretary of Transportation issued preemptive regulations concerning engineer certification. Included in these regulations is a specific, detailed scheme setting out dispute resolution procedures. The regulations establish a review board to consider petitions challenging a railroad's denial of certification or recertification, or revocation of

"[a]ny issue raised in this area is a federal issue justifying removal." Id. In Chapman, however, we found no preemption as to common-law claims arising from alleged deficient performance in the drug testing process because "the applicable statute and regulations concerning drug testing do not establish an intent to preempt the substantive common law at issue," where the FRA's drug testing regulations included an anti-waiver provision.[3]

> certification. Any person denied certification can petition the Locomotive Engineer Review Board (Board) to determine whether the denial was improper. Any party adversely affected by the Board's decision has a right of appeal. This "comprehensive remedial scheme . . . serves to confirm [the FRSA's] preemptive scope."

Peters, 80 F.3d at 261 (quoting Rayner v. Smirl, 873 F.2d 60, 65 (4th Cir. 1989)) (citations omitted).

[3] The anti-waiver provision reads:

> An employee required to participate in body fluid testing . . . shall . . . evidence consent to taking of samples . . . . The employee is not required to execute any document or clause waiving rights that the employee would otherwise have against the employer, and any such waiver is void. The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling, or analysis of the specimen or to indemnify any person for the negligence of others.

Department of Transportation Alcohol/Drug Regulations, 54 Fed. Reg. 53,261 (Dec. 27, 1989); see also 49 C.F.R. 219.11(d)

390 F.3d at 628-29. Because we found no preemption, we reasoned there was thus no complete preemption. Id. at 629.[4] We distinguished Peters by noting: "[u]nlike the drug testing regulations, the rules at issue in Peters did not contain a provision that could be construed as a savings clause through which the Secretary preserved state common-law claims," and in Peters "the comprehensive administrative adjudication

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(1989).

[4] We also noted the FRSA does not "provide[] a private right of action for a person aggrieved by negligence in the analysis of a drug test, and the absence of an alternative cause of action militates against a finding of complete preemption." 390 F.3d at 629. However, our statement was dicta in light of our holding earlier in the opinion there was no complete preemption because not even regular preemption lay. Id. at 629. Compare Gaming Corp., 88 F.3d at 547, which stated:

> The issue of whether complete preemption exists is separate from the issue of whether a private remedy is created under a federal statute. Caterpillar Inc. v. Williams, 482 U.S. 386, 391 n.4, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987). Complete preemption can sometimes lead to dismissal of all claims in a case. Although courts may be reluctant to conclude that Congress intended plaintiffs to be left without recourse, see M. Nahas & Co., Inc. v. First National Bank of Hot Springs, 930 F.2d 608, 612 (8th Cir. 1991), the intent of Congress is what controls. Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 45, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987) (citations omitted).

system for handling certification disputes . . . influenced our court's complete preemption analysis." Id. at 628, 630.

Given that the FRSA preemption clauses are substantively identical in Peters and Chapman, and our finding complete preemption in the former but not the latter by distinguishing the regulations at issue in the cases, complete preemption turns first on the Secretary of Transportation's regulations "covering the subject matter of the State Requirement" and then any given regulation's solicitude for state law. See 49 U.S.C. § 20106. Again, for example, the drug-testing regulations at issue in Chapman contained an anti-waiver provision which displayed a "solicitude for state common law distinguish[ing it] . . . from the [regulations establishing a] comprehensive administrative adjudication system for handling certification disputes that influenced our court's complete preemption analysis in Peters." 390 F.3d at 630.

In this case, the Lundeens bring claims based in part on negligent inspection of railroad track. FRSA track inspection regulations lack the solicitude for state law demonstrated by the anti-waiver clause in Chapman. This situation is more akin to our discussion in In re Derailment Cases, 416 F.3d 787 (8th Cir. 2005), involving inspection of railroad freight cars. We found preemption where:

> The FRA has adopted regulations that require inspections of freight cars at each location where they are placed in a train. Railroads must designate inspectors who "have demonstrated to the railroad a knowledge and ability to inspect railroad freight cars for compliance with the

[FRA regulations]." The FRA's regulations specify that a railroad may not place or continue in service a car that, inter alia, has a defective coupler or a defective draft key retainer assembly.

The regulations also establish a "national railroad safety program" intended "to promote safety in all areas of railroad operations in order to reduce deaths, injuries and damage to property resulting from railroad accidents." Federal and state inspectors "determine the extent to which the railroads, shippers, and manufacturers have fulfilled their obligations with respect to inspection, maintenance, training, and supervision." Inspectors visit rail yards to ensure compliance with the regulations and railroads face civil penalties for violations.

. . .

. . . It is clear that the FRA's regulations are intended to prevent negligent inspection by setting forth minimum qualifications for inspectors, specifying certain aspects of freight cars that must be inspected, providing agency monitoring of the inspectors, and establishing a civil enforcement regime. These intentions are buttressed by the FRA's inspection manual for federal and state inspectors. Further, there is no indication that the FRA meant to leave open a state tort cause of action to deter negligent inspection. . . . Accordingly, we conclude that Plaintiffs' negligent inspection claims are

preempted by the FRA's regulations.

In re Derailment Cases, 416 F.3d at 793-794 (citations and footnotes omitted). We distinguished Chapman by noting the regulations there "specifically contemplate[d] the existence of a common-law cause of action for negligence." Id. at 794.

Similarly, federal regulations establish a specific inspection protocol including how, 49 C.F.R. § 213.233(b), when, §§ 213.233(c) & .237(a)-(c), and by whom, §§ 212.203, 213.7 & .233(a), track inspections must be conducted; the regulations establish a national railroad safety program intended to promote safety in all areas of railroad operations, § 212.101(a); federal and state inspectors determine the extent to which the railroads, shippers, and manufacturers have fulfilled their obligations with respect to, among other things, inspection, § 212.101(b)(1); and railroads face civil penalties for violations, § 213 App. B. It is clear the FRA regulations are intended to prevent negligent track inspection and there is no indication the FRA meant to leave open a state law cause of action.

We note the FRSA's preemption clause is employed within a provision that displays considerable solicitude for state law in that its express preemption clause is both prefaced and succeeded by express savings clauses, and we also note In re Derailment was a conflict rather than complete preemption case. Nonetheless, where we find the Lundeens' negligent inspection claims preempted following the logic in In Re Derailment and where it is both clear the regulations at issue are intended to prevent negligent track inspection nationally and contain no savings clause (so there is thus no indication the FRA meant to leave open a state law cause of action), absent en

banc review we are bound by our decision in Peters to find complete, jurisdictional, preemption. The district court therefore has subject-matter jurisdiction in the instant case and improperly remanded the case to state court.

III

Based on the foregoing, this case is reversed and remanded for proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Tom Lundeen, individually, and
Nanette Lundeen, individually, and
Tom Lundeen and Nanette Lundeen
of, and as parents and natural guardians
of Molly Lundeen, a minor, and
Michael Lundeen,

Plaintiffs,

Civ. No. 04-3220 (RHK/AJB)
MEMORANDUM OPINION
AND ORDER

v.

Canadian Pacific Railway Company,
Canadian Pacific Limited,
Canadian Pacific Railway Limited, and
Soo Line Railroad Company,

Defendants.

Collin P. Dobrovolny and Bryan L. Van Grinsven, McGee, Hankla, Backes & Dobrovolny, PC, Minot, North Dakota, for Plaintiffs.

Timothy R. Thornton, Scott G. Knudson, and Kevin M. Decker, Briggs and Morgan, Minneapolis, Minnesota, for Defendants.

Introduction

This case (and thirty other "related" cases[1]) arises out of injuries sustained by the release of liquified anhydrous ammonia after a train derailment in North Dakota. Before the Court is plaintiffs' Motion for Remand and For Costs and Attorney's Fees. For the reasons stated below, the Court will deny the Motion.

Background

Plaintiffs in this case are Tom and Nanette Lundeen, both individually and on behalf of Molly and Michael Lundeen (collectively, the "Lundeens"). Defendants are Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited and Soo Line Railroad Company (collectively "CPR").

On January 18, 2002, a CPR freight train derailed just west of Minot, North Dakota. (Compl.¶ VIII.) Several tank cars containing liquified anhydrous ammonia ruptured and released their contents into the surrounding environment. (Id.)

In June 2004, the Lundeens sued CPR in Minnesota state court alleging injuries and various claims for relief. Among their claims is the following:

COUNT THREE

V.

The Defendant CPR violated applicable state law, both North Dakota and Minnesota, as well as United States law,

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[1] See Exhibit A (attached).

resulting in the release of hazardous substances and which amount to contamination, pollution, unauthorized release of hazardous material and other violations of applicable "environmental laws" and for which Defendant CPR is strictly liable for damages occasioned thereby, including, but not limited to, personal injury, property damage, statutory penalties, actual attorney's fees, and other damages as specified in applicable environmental laws. (Id. Count Three, ¶ V.)

In July 2004, CPR removed the case to this Court based upon federal question jurisdiction pursuant to 28 U.S.C. § 1441(a) and (b). In August 2004, the Lundeens moved to remand the case to state court on the ground that no federal question jurisdiction exists. (Pls.' Reply Mem. in Supp. of Mot. to Remand at 2.)[2]

Standard of Review

A defendant may remove a matter from state court if that matter could have originally been brought in federal court, 28 U.S.C. § 1441(a), or if the federal court has original jurisdiction founded on a claim or right arising under the

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[2] This is not the first time that issues dealing with this train derailment have been before a judge in this District. Judge Montgomery remanded several derailment cases to state court on the ground that the state claims alleged therein were not completely preempted by federal law. See Allende v. Soo Line R.R. Co., et al., Civ. No. 03-3093, slip op. at 32-33 (D.Minn. Jan. 29, 2004) (Report and Recommendation). Unlike the previous cases, however, complete preemption is not at issue in this case. And, as noted below, the previous cases do not allege violations of "United States law."

Constitution, treaties or laws of the United States, 28 U.S.C. § 1441(b).[3] The district court must, however, remand the case to state court "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction...." 28 U.S.C. § 1447(c). The party seeking removal and opposing remand has the burden of establishing federal subject matter jurisdiction. In re Bus. Men's Assurance Co., 992 F.2d 181, 183 (8th Cir.1993). When reviewing a motion to remand, a court must resolve all doubts concerning federal jurisdiction in favor of remand. Id. However, "[a] district court has no discretion to remand a claim that states a federal question" and the existence of a federal question is an issue of law. Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536, 542 (8th Cir.1996) (citations omitted).

Analysis

The issue presented on the Lundeens' Motion for Remand is whether this Court has federal question jurisdiction

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[3] Section 1441(a) provides, in relevant part:
Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending....
Section 1441(b) provides, in relevant part:
Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties....

based upon their allegations in Count Three, ¶ V. The Lundeens argue that they do not allege a federal question and request a remand to state court. (Pl.'s Reply Mem. in Supp. of Mot. to Remand at 2; Pl.'s Reply to Defs.' Resp. to Mot. to Remand at 2.) Conversely, CPR argues that the Lundeens*829 allege a federal question-specifically, a question of federal environmental law-and oppose remand. (Defs.' Opp'n to Mot. to Remand at 1, 4.) The Lundeens respond that they did not intend to allege a violation of federal environmental law, and, even if they did, no federal environmental law would provide them with the relief they are requesting. (Pl.'s Reply Mem. in Supp. of Mot. to Remand at 3, 3 n. 3 (citing statutes and cases); Pl.'s Reply to Defs.' Resp. to Mot. to Remand at 2.)

"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (citation omitted). "When a federal question is present on the face of the complaint, the district court has original jurisdiction and the action may be removed to federal court." Williams v. Ragnone, 147 F.3d 700, 702 (8th Cir.1998) (citing Caterpillar, 482 U.S. at 392-93, 107 S.Ct. 2425). "[T]he presence of even one federal claim gives the defendant the right to remove the entire case to federal court." Gaming Corp., 88 F.3d at 543 (citing 28 U.S.C. § 1441); see Country Club Estates, L.L.C. v. Town of Loma Linda, 213 F.3d 1001, 1003 (8th Cir.2000) ("A complaint that pleads violations of both state and federal law is within the original jurisdiction of a federal district court." (citations omitted)). But the plaintiff is "the master of the claim," Caterpillar, 482 U.S. at 392, 107 S.Ct. 2425, and "can

avoid removal to federal court by alleging only state law claims," Gaming Corp., 88 F.3d at 542 (citation omitted). As such, "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 809 n. 6, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986).

The Court finds that the face of the Lundeens' Complaint states a federal question. The Complaint alleges that *"CPR violated applicable state law ... as well as United States law,* resulting in the release of hazardous substances and which amount to contamination, pollution, unauthorized release of hazardous material and other violations of applicable 'environmental laws'...." (Compl. Count Three, ¶ V (emphasis added).) Country Club Estates is instructive. In that case, the Eighth Circuit found that the following allegation invoked federal jurisdiction:

The Court order [referring to an order of the County Commission of Newton County, Missouri, purporting to establish the Town of Loma Linda] is further invalid because Relators were not given proper notice of the hearing as required by the Statutes and Constitution of Missouri *and the Constitution of the United States of America,* including those provisions which prohibit the taking of property without due process of law, which process requires proper notice.

Country Club Estates, 213 F.3d at 1003 (alteration in original) (emphasis added). In finding federal question jurisdiction, the court observed that "[t]he reference to the Constitution of the United States is unequivocal." Id. It concluded that "here, the federal question arises not by way of defense, but on the face of the complaint. It is part of the plaintiffs' cause of action, as demonstrated by the words they

themselves selected." Id. at 1004. Much like the allegation examined in Country Club Estates, the Lundeens' reference to "United States law" in Count Three, ¶ V is unequivocal. It is part of their cause of action as demonstrated by the words they themselves selected.

The Lundeens could have omitted the reference to "United States law" and alleged only state law claims-this would have prevented removal to this Court. See Gaming Corp., 88 F.3d at 542. As the Supreme Court has observed, "the plaintiff is the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." Caterpillar, 482 U.S. at 392, 107 S.Ct. 2425 (footnote omitted). While "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced," Merrell Dow, 478 U.S. at 809 n. 6, 106 S.Ct. 3229 (citations omitted), the Court cannot say that the Lundeens have not advanced a theory of liability under federal environmental law. Accordingly, this Court "has no discretion to remand a claim that states a federal question." Gaming Corp., 88 F.3d at 542 (citations omitted).

The Lundeens argue that their reference to "United States law" pertains to federal maintenance and repair regulations that CPR violated, causing the train to derail and spill ammonia in violation of state environmental laws. (Pls.' Reply Mem. in Supp. at 4-5.) The Court is not persuaded. It is not that this argument is beyond belief, but it does nothing to alter the Court's obligation to look to the face of the Complaint and determine whether a federal question is presented. See Caterpillar, 482 U.S. at 392, 107 S.Ct. 2425; Williams, 147 F.3d at 702. Setting the Lundeens' argument to one side, a federal question appears *on the face* of Count Three, ¶ V. Plaintiffs' counsel cannot argue away the words written in the

Complaint. Although the Lundeens contend that their Complaint is identical to those in the derailment cases previously remanded, so far as this Court can tell, none of those cases alleged a violation of "United States law." In sum, a reasonable reading of Count Three, ¶ V reveals that it asserts a federal question.

The Lundeens also argue that even if they alleged a violation of federal environmental laws, such laws generally do not provide a private right of action or allow recovery of personal injuries. (Pls.' Reply Mem. in Supp. at 3 n. 3; Pls.' Reply to Defs.' Resp. at 2-4.) Even if this argument is correct,[4] it is unavailing because it fails to recognize the distinction between the existence of a valid claim upon which the Lundeens could recover and the existence of subject matter jurisdiction. As the Supreme Court has explained:

> It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional *power* to adjudicate the case.... As we stated in Bell v. Hood, 327 U.S 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946), "[j]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." Rather, the district court has jurisdiction if "the right of the petitioners to recover under their complaint will be sustained

[4] The Court expresses no opinion on the merits of this argument.

> if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," ... unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous...." Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy...."

Steel Co. v. Citizens For A Better Environment, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (citations omitted) (emphasis in original); see Caterpillar, 482 U.S. at 391 n. 4, 107 S.Ct. 2425 (" 'The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy ....' " (citation omitted)); United States ex rel. Foulds v. Texas Tech Univ., 171 F.3d 279, 288 (5th Cir.1999) ("A determination that the relevant statute creates no cause of action under which the plaintiff may proceed says nothing about a court's subject-matter jurisdiction over the suit." (citation omitted)). In this case, jurisdiction is not defeated by the possibility that the averments to "United States law" might fail to state a cause of action. See Steel Co., 523 U.S. at 89, 118 S.Ct. 1003. Indeed, the absence of a valid cause of action "does not implicate subject-matter jurisdiction." Id. Thus, whether the Lundeens could actually recover under federal

environmental law does not impact the question of jurisdiction.[5] Whether the federal environmental claims would be dismissed for failure to state a claim, and if they were dismissed, whether this Court would exercise its supplemental jurisdiction over the remaining state law claims, are questions for another day.[6]

Conclusion

Based on the foregoing, and all of the files, records, and proceedings herein, **IT IS ORDERED** that the Lundeens' Motion for Remand and For Costs and Attorney's Fees (Doc. No. 6) is **DENIED**.[7]

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[5] It is noteworthy that when it found federal question jurisdiction in Country Club Estates, the Eighth Circuit did not examine whether plaintiffs' constitutional claims would ultimately succeed or provide them with the relief they requested.

[6] Citing Merrell Dow, the Lundeens argue that "a complaint that alleges a violation of a federal statute as an element of a state cause of action, when there is no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'" (Pls.' Reply Mem. in Supp. of Mot. to Remand at 3 n. 3.) Unlike the plaintiffs in Merrell Dow, who alleged that a violation of federal law created a rebuttable presumption of negligence, 478 U.S. at 806, 106 S.Ct. 3229, however, the Lundeens do not allege a violation of federal environmental law as an element of a state cause of action. Rather, on the face of their Complaint, they allege a violation of federal environmental law as a cause of action in its own right.

[7] Counsel have agreed that this Memorandum Opinion and Order will apply to each of the "related" cases identified in

Dated: October 26, 2004

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

Exhibit A

The "related" cases are:

Salling, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3221;
Darveaux, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3222;
Schafer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3223;
Wickman v. Canadian Pacific Railway Co., et al., Civ. No. 04-3224;
Swenson, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3225;
Behnkie, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3282;
Carlson v. Canadian Pacific Railway Co., et al., Civ. No. 04-3283;
Crabbe, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3284;
Dahly, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3286;
Duchsherer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3287;
Deutsch, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3288;

Exhibit A (attached). (See Pls.' Reply Mem. in Supp. of Mot. to Remand at 2 n. 2; Defs.' Opp'n to Mot. to Remand at 1 n. 1.)

Flick v. Canadian Pacific Railway Co., et al., Civ. No. 04-3290;
Gleason v. Canadian Pacific Railway Co., et al., Civ. No. 04-3291;
Goerndt v. Canadian Pacific Railway Co., et al., Civ. No. 04-3292;
Gross, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3293;
Just v. Canadian Pacific Railway Co., et al., Civ. No. 04-3294;
Korgel v. Canadian Pacific Railway Co., et al., Civ. No. 04-3295;
McBride, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3296;
Muhlbradt v. Canadian Pacific Railway Co., et al., Civ. No. 04-3297;
Shigley v. Canadian Pacific Railway Co., et al., Civ. No. 04-3298;
Smith, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3299;
Todosichuk v. Canadian Pacific Railway Co., et al., Civ. No. 04-3300;
Hingst v. Canadian Pacific Railway Co., et al., Civ. No. 04-3301;
Freeman, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3303;
Weltzin v. Canadian Pacific Railway Co., et al., Civ. No. 04-3304;
Todd v. Canadian Pacific Railway Co., et al., Civ. No. 04-3305;
Lakoduk v. Canadian Pacific Railway Co., et al., Civ. No. 04-3306;
Westmeyer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3307;

Slorby v. Canadian Pacific Railway Co., et al., Civ. No. 04-3309; and
Nisbet, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3311.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Tom Lundeen, individually, and
Nanette Lundeen, individually, and
Tom Lundeen and Nanette Lundeen on
Behalf of, and as parents and natural
Guardians of Molly Lundeen, a minor,
and Michael Lundeen,

Plaintiffs,

Civ. No. 04-3220 (RHK/AJB)
MEMORANDUM OPINION
AND ORDER

v.

Canadian Pacific Railway Company,
Canadian Pacific Limited,
Canadian Pacific Railway Limited, and
Soo Line Railroad Company,

Defendants.

Collin P. Dobrovolny and Bryan L. Van Grinsven, McGee, Hankla, Backes & Dobrovolny, PC, Minot, North Dakota, for Plaintiffs.

Timothy R. Thornton, Scott G. Knudson, and Kevin M. Decker, Briggs and Morgan, Minneapolis, Minnesota, for Defendants.

Introduction

This case (and thirty other "related" cases[1]) arises out of injuries sustained by the release of liquefied anhydrous ammonia after a train derailment in North Dakota. Before the Court is plaintiffs' second remand motion. For the reasons set forth below, the Court will grant the motion.

Background

Plaintiffs in this case are Tom and Nanette Lundeen, both individually and on behalf of Molly and Michael Lundeen (collectively, the "Lundeens"). Defendants are Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited, and Soo Line Railroad Company (collectively, "CPR").

In June 2004, the Lundeens sued CPR in Minnesota state court. Among their original claims, they alleged that "CPR violated applicable state law ... *as well as United States law*, resulting in the release of hazardous substances and which amount to contamination, pollution, unauthorized release of hazardous material and other violations of applicable 'environmental laws'...." (Compl. Count Three ¶ V (emphasis added).)

In July 2004, CPR removed the case to this Court based upon federal question jurisdiction pursuant to 28 U.S.C. §

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[1] See Exhibit A (attached).

1441(a) and (b).[2] In August 2004, the Lundeens filed their first remand motion on the ground that no federal question jurisdiction existed. This Court denied that motion, finding that the face of the complaint-specifically, the reference to "United States law"-stated a federal question. Lundeen v. Canadian Pacific Ry. Co., 342 F.Supp.2d 826, 829 (D.Minn.2004).[3]

In November 2004, the Lundeens moved to amend their complaint to delete the federal claim and, in the alternative, to voluntarily dismiss that claim. (See Doc. Nos. 26, 29.) At the same time, they filed a motion, conditioned upon amendment of the complaint or voluntary dismissal of the federal claim, to remand to state court. (See Doc. No. 33.)

In January 2005, Magistrate Judge Boylan granted the

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[2] Section 1441(a) provides, in relevant part:
Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending....
Section 1441(b) provides, in relevant part:
Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties....

[3] The Lundeens declined to amend their Complaint at that time-even though the Court's inquiry of counsel should have made it abundantly clear that a request would have been granted.

Lundeens' motion to amend and determined that the motion to dismiss was moot. (Doc. No. 54.) CPR sought reimbursement for expenses incurred in opposing the Lundeens' motions, which it estimated at $5,000. (Id.) Considering that only the motions to amend and dismiss were pending before him, while the second remand motion was before the undersigned, Magistrate Judge Boylan ordered the Lundeens (and another moving party) to pay CPR a total of $2,000. (Id.)

In February 2005, the Lundeens filed an Amended Complaint. (Doc. No. 55.) The reference to "United States law," which had formed the basis for federal question jurisdiction, was deleted. The Court now considers the Lundeens' second remand motion.

Analysis

The Lundeens argue that this case should be remanded to state court because the federal claim has been deleted and only state-law claims remain. In Carnegie-Mellon University v. Cohill, 484 U.S. 343, 348 (1988), the Supreme Court considered whether a district court has discretion to remand a removed case to state court "when all federal-law claims have dropped out of the action and only pendant state-law claims remain." The plaintiffs in Cohill filed suit in state court alleging violations of state and federal age-discrimination laws, as well as state common-law claims. Id. at 345. Defendants removed on the basis of federal question jurisdiction. Id. Six months later, the plaintiffs moved to amend their complaint to delete the federal claim and moved to remand. Id. at 346. After granting the motion to amend, the district court remanded the action to state court. Id. The Supreme Court held that "a district court has discretion to remand to state court a removed case involving

pendant claims upon a proper determination that retaining jurisdiction over the case would be inappropriate." Id. at 357. In exercising discretion to remand, district courts are to consider "the principles of economy, convenience, fairness, and comity." Id.

Under these principles, the Court finds that retaining jurisdiction over this case would be inappropriate. First, this case is in its initial stages and a remand would waste little judicial resources: no scheduling orders have been issued, no discovery has been conducted, and no trial date has been set. Second, it is not inconvenient or unfair for CPR to litigate this matter in state court. Presently, CPR is defending cases in state court that arise out of the same train derailment. See *e.g.*, Allende v. Soo Line R.R. Co., et al., Civ. No. 03-3093 (D.Minn. Jan. 29, 2004) (Report and Recommendation recommending case be remanded to state court). Finally, remand will avoid a determination of state-law claims by this Court that could conflict with state court decisions in the other derailment cases. See Cohill, 484 U.S. at 350-51. As noted in Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), upon which the Cohill court relied, "[n]eedless decisions of state law [by federal courts] should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."

CPR argues that the remand motion should be denied because the Lundeens have engaged in forum shopping. While the Cohill court recognized that "forum manipulation" is a factor to be considered when determining whether to remand a case, there is no "categorical prohibition" on remanding cases where the plaintiff has attempted to manipulate the forum. Cohill, 484 U.S. at 357. Here, the Court finds no forum manipulation has

occurred that would prohibit remand. The Lundeens have explained that they had no desire to allege or pursue federal claims. Once this Court determined that they had alleged a federal claim, which was only a small portion of the original Complaint, they promptly moved to amend and remand. Moreover, to the extent that forum manipulation may have occurred, remand is still warranted given the weight of the factors pointing in favor of sending the case back to state court.

As the Supreme Court has recognized, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendant jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point toward declining to exercise jurisdiction over the remaining state-law claims." Id. at 350 n. 7. Here, as in Cohill, the balance of factors points toward declining to exercise jurisdiction over the Lundeens' remaining state-law claims. Accordingly, the Court will grant the Lundeens' Motion to Remand Action.[4]

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[4] Although the Lundeens primarily rely on Cohill in support of their remand motion, they also cite 28 U.S.C. § 1367(c)(2) and (3) as bases for remand. Section 1367(c)(2) and (3) provide that district courts may decline to exercise supplemental jurisdiction over state-law claims where "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction" or where "the district court has dismissed all claims over which it has original jurisdiction." The Court finds that § 1367(c) provides additional support for remand. See In re Prairie Island Dakota Sioux, 21 F.3d 302, 304 (8th Cir.1994) (affirming remand of removed case under § 1367(c) and Cohill where the plaintiff amended complaint to delete federal-law claims).

As a final matter, CPR seeks reimbursement of its costs and attorneys' fees. They argue that the Lundeens' federal claim, which has now been deleted, caused it "to research, draft, and file Notices of Removal, Notices of Filing of Removal, Opposition to Remand, Response to Motion to Remand, and Opposition to Motions to Amend or Dismiss Complaint and Remand Action." (CPR Supp. Opp'n Mem. at 4.) It fixes its costs at $4,650, which represents a $150 filing fee for each of the thirty-one removed cases. (Decker Aff. ¶ 1.) It fixes its reasonable attorneys' fees for "removing plaintiffs' case to this Court and responding to plaintiffs' two motions for remand" at $7,570. (Id. ¶ 5.) Thus, CPR seeks $12,220 in total reimbursement. The Lundeens have not opposed CPR's request.

Considering the totality of the circumstances, the Court concludes that the Lundeens should reimburse CPR $3,500 for its attorneys' fees. When given the opportunity to eliminate the federal claim during the first remand motion, counsel for the Lundeens declined. His refusal to strike that claim caused CPR to litigate two otherwise unnecessary remand motions. In the Court's view, it is fair and just for the Lundeens to reimburse CPR for part of its attorneys' fees. However, it would not be fair or just to require the Lundeens to reimburse CPR for its thirty-one filing fees or for that portion of its attorneys' fees not associated with the remand motions. First, contrary to CPR's suggestion, the federal court litigation was not all for naught-it resulted in the elimination of a federal claim. Second, as exemplified by Cohill, there is always a risk when removing a case based on federal question jurisdiction that the complaint will be amended and the case remanded. Finally, this amount takes into account Magistrate Judge Boylan's order that the Lundeens (and another moving party) pay CPR $2,000.

Conclusion

Based on the foregoing, and all of the files, records, and proceedings herein, IT IS ORDERED:[5]

1. The Lundeens' Motion to Remand Action (Doc. No. 33) is GRANTED and this matter, and the thirty "related" actions identified in Exhibit A (attached), shall be remanded to Hennepin County District Court; and
2. The Lundeens shall reimburse CPR for reasonable attorneys' fees in the total amount of $3,500 (this is in addition to the $2,000 ordered by Magistrate Judge Boylan).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 9, 2005

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

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[5] As with the first remand motion, counsel have agreed that this Memorandum Opinion and Order will apply to each of the "related" cases identified in Exhibit A (attached).

Exhibit A

The "related" cases are:

Salling, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3221;
Darveaux, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3222;
Schafer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3223;
Wickman v. Canadian Pacific Railway Co., et al., Civ. No. 04-3224;
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Behnkie, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3282;
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Crabbe, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3284;
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Deutsch, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3288;
Flick v. Canadian Pacific Railway Co., et al., Civ. No. 04-3290;
Gleason v. Canadian Pacific Railway Co., et al., Civ. No. 04-3291;
Goerndt v. Canadian Pacific Railway Co., et al., Civ. No. 04-3292;

Gross, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3293;
Just v. Canadian Pacific Railway Co., et al., Civ. No. 04-3294;
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Hingst v. Canadian Pacific Railway Co., et al., Civ. No. 04-3301;
Freeman, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3303;
Weitzin v. Canadian Pacific Railway Co., et al., Civ. No. 04-3304;
Todd v. Canadian Pacific Railway Co., et al., Civ. No. 04-3305;
Lakoduk v. Canadian Pacific Railway Co., et al., Civ. No. 04-3306;
Westmeyer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3307;
Slorby v. Canadian Pacific Railway Co., et al., Civ. No. 04-3309; and
Nisbet, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3311.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-1918

Tom Lundeen, et al.	*	
	*	
Appellees,	*	
	*	Order Denying Petition
v.	*	for Rehearing and for
	*	Rehearing En Banc
Canadian Pacific Railway	*	
Co., etc. et al.,	*	
	*	
Appellants.	*	

The motion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye and Judge Smith would grant the petition for rehearing en banc.

(5128-010199)

July 18, 2006

Order Entered at the Direction of the Court.

Clerk, U.S. Court of Appeals, Eighth Circuit

STATUTES INVOLVED

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441 provides, in pertinent part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

The Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.*, provides as follows in pertinent part:

Section 20101. Purpose

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

Section 20104. Emergency authority

(c) Civil actions to compel issuance of orders.--An employee of a railroad carrier engaged in interstate or foreign commerce

who may be exposed to imminent physical injury during that employment because of the Secretary's failure, without any reasonable basis, to issue an order under subsection (a) of this section, or the employee's authorized representative, may bring a civil action against the Secretary in a district court of the United States to compel the Secretary to issue an order. The action must be brought in the judicial district in which the emergency situation is alleged to exist, in which that employing carrier has its principal executive office, or for the District of Columbia. The Secretary's failure to issue an order under subsection (a) of this section may be reviewed only under section 706 of title 5.

Section 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--

(1) is necessary to eliminate or reduce an essentially local safety or security hazard;
(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

Section 20109. Employee protections

(a) Filing Complaints and Testifying. - A railroad carrier engaged in interstate or foreign commerce may not discharge or in any way discriminate against an employee because the employee, whether acting for the employee or as a representative, has -

(1) filed a complaint or brought or caused to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety, chapter 51 or 57 of this title; or

(2) testified or will testify in that proceeding.

(b) Refusing to work because of hazardous conditions.--(1) A railroad carrier engaged in interstate or foreign commerce may not discharge or in any way discriminate against an employee for refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if--

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that--

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger through regular statutory means; and

(C) the employee, where possible, has notified the carrier of the hazardous condition and the intention not to perform further work unless the condition is corrected immediately.

(2) This subsection does not apply to security personnel employed by a carrier to protect individuals and property transported by railroad.

(c) Dispute resolution.--A dispute, grievance, or claim arising under this section is subject to resolution under section 3 of the Railway Labor Act (45 U.S.C. 153). In a proceeding by the National Railroad Adjustment Board, a division or delegate of the Board, or another board of adjustment established under section 3 to resolve the dispute, grievance, or claim, the proceeding shall be expedited and the dispute, grievance, or claim shall be resolved not later than 180 days after it is filed. If the violation is a form of discrimination that does not involve discharge, suspension, or another action affecting pay, and no other remedy is available under this subsection, the Board, division, delegate, or other board of adjustment may award the employee reasonable damages, including punitive damages, of not more than $20,000.

§ 20111. Enforcement by the Secretary of Transportation

(a) Exclusive authority.--The Secretary of Transportation has exclusive authority--

(1) to impose and compromise a civil penalty for a violation of a railroad safety regulation prescribed or order issued by the Secretary;
(2) except as provided in section 20113 of this title, to request an injunction for a violation of a railroad safety regulation prescribed or order issued by the Secretary; and
(3) to recommend appropriate action be taken under section 20112(a) of this title.

(b) Compliance orders.--The Secretary may issue an order directing compliance with this part or with a railroad safety regulation prescribed or order issued under this part.

(c) Orders prohibiting individuals from performing safety-sensitive functions.--If an individual's violation of this chapter or any of the laws transferred to the jurisdiction of the Secretary of Transportation by subsection (e)(1), (2), and (6)(A) of section 6 of the Department of Transportation Act, as in effect on June 1, 1994, or a regulation prescribed or order issued by the Secretary under this chapter is shown to make that individual unfit for the performance of safety-sensitive functions, the Secretary, after notice and opportunity for a hearing, may issue an order prohibiting the individual from performing safety-sensitive functions in the railroad industry for a specified period of time or until specified conditions are met. This subsection does not affect the Secretary's authority under section 20104 of this title to act on an emergency basis.

(d) Regulations requiring reporting of remedial actions.--(1) The Secretary shall prescribe regulations to require that a railroad carrier notified by the Secretary that imposition of a civil penalty will be recommended for a failure to comply with this part, chapter 51 or 57 of this title, or a regulation prescribed or order issued under any of those provisions, shall report to the Secretary, not later than the 30th day after the end of the month in which the notification is received--

(A) actions taken to remedy the failure; or
(B) if appropriate remedial actions cannot be taken by that 30th day, an explanation of the reasons for the delay.

(2) The Secretary--

(A) not later than June 3, 1993, shall issue a notice of a regulatory proceeding for proposed regulations to carry out this subsection; and
(B) not later than September 3, 1994, shall prescribe final regulations to carry out this subsection.

§ 20112. Enforcement by the Attorney General

(a) Civil actions.--At the request of the Secretary of Transportation, the Attorney General may bring a civil action in a district court of the United States--

(1) to enjoin a violation of, or to enforce, a railroad safety regulation prescribed or order issued by the Secretary;
(2) to collect a civil penalty imposed or an amount agreed on in compromise under section 21301 of this title; or
(3) to enforce a subpena issued by the Secretary under this chapter.

(b) Venue.--(1) Except as provided in paragraph (2) of this subsection, a civil action under this section may be brought in the judicial district in which the violation occurred or the defendant has its principal executive office. If an action to collect a penalty is against an individual, the action also may be brought in the judicial district in which the individual resides.

(2) A civil action to enforce a subpena issued by the Secretary or a compliance order issued under section 20111(b) of this title may be brought in the judicial district in which the defendant resides, does business, or is found.

§ 20113. Enforcement by the States

(a) Injunctive relief.--If the Secretary of Transportation does not begin a civil action under section 20112 of this title to enjoin the violation of a railroad safety regulation prescribed or order issued by the Secretary not later than 15 days after the date the Secretary receives notice of the violation and a request from a State authority participating in investigative and surveillance activities under section 20105 of this title that the action be brought, the authority may bring a civil action in a district court of the United States to enjoin the violation. This subsection does not apply if the Secretary makes an affirmative written finding that the violation did not occur or that the action is not necessary because of other enforcement action taken by the Secretary related to the violation.

(b) Imposition and collection of civil penalties.--If the Secretary does not impose the applicable civil penalty for a violation of a railroad safety regulation prescribed or order issued by the Secretary not later than 60 days after the date of receiving notice from a State authority participating in investigative and surveillance activities under section 20105 of this title, the authority may bring a civil action in a district court of the United States to impose and collect the penalty. This paragraph does not apply if the Secretary makes an affirmative written finding that the violation did not occur.

(c) Venue.--A civil action under this section may be brought in the judicial district in which the violation occurred or the defendant has its principal executive office. However, a State authority may not bring an action under this section outside the State.

No. 06-528

IN THE

Supreme Court of the United States

TOM LUNDEEN, *et al.*
Petitioners,

v.

CANADIAN PACIFIC RAILWAY COMPANY, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TIMOTHY ROBERT THORNTON
Counsel of Record
SCOTT G. KNUDSON
KEVIN M. DECKER
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

Attorneys for Respondents Canadian Pacific Railway Company, et al.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the decision below correctly adheres to unanimous circuit court precedent by confirming the complete preemptive effect of the Federal Railroad Safety Act, without regard to the relief available after removal jurisdiction attaches?

PARTIES TO THE PROCEEDINGS

Petitioners are Tom and Nanette Lundeen, individually and on behalf of Molly and Michael Lundeen, minors; Melissa Todd; Irene Clare Korgel; Trent and Randi Lou Westmeyer; Darla M. Just; Mary Beth Gross, individually and on behalf of Brett Gross, a minor; Mark and Sandra Nesbit; LeRoy Slorby; Ray Lokoduk; JoAnn Flick; Wilfred and Geraldine Dahly; Marilyn Carlson; Gerald Wickman; Dion and Brenda Darveaux, individually and on behalf of Kendall Darveuax, a minor; Shelly Hingst; Bobby and Mary Smith; Richard Muhlbradt; Doug Weltzin; Nathan and Nichole Freeman, individually and on behalf of Ashlyn Freeman, a minor; Charlotte Goerndt; Leo Gleason; Judy Deutsch, individually and on behalf of Tyrone Deutsch, a minor; Denise Duchsherer, Leo Duchsherer, and Joshua Duchsherer; Larry and Carol Crabbe; Rebecca M. Behnkie, individually and on behalf of Nathaniel Behnkie, a minor; Charles and Sandra Swenson; Larry and Tami Schafer, individually on behalf of Jenna Schafer, a minor; John Salling, individually, and Lorenda Poissant Salling, individually and on behalf of Sebastian Poissant, a minor; Rachelle Todosichuk; Lonni Shigley; and Richard McBride and Linda McBride.

Respondents are Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited, and Soo Line Railroad Company.

RULE 29.6 STATEMENT

Canadian Pacific Railway Company is a wholly-owned subsidiary of Canadian Pacific Railway Limited; Soo Line Railroad Company is an indirect wholly-owned subsidiary of Canadian Pacific Railway Company. Canadian Pacific Limited changed its name to Fairmont Hotels & Resorts Inc. as of October 1, 2001, and since that date has no relationship to Canadian Pacific Railway Limited, Canadian Pacific Railway Company or Soo Line Railroad Company. No other publicly held corporation owns 10% or more of the shares of either Canadian Pacific Railway Company, Canadian Pacific Railway Limited, or Soo Line Railroad Company.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit affirming removal on complete preemption grounds is reported at 447 F.3d 606 and reproduced in petitioners' appendix ("Pet. App.") at 1a-29a. The order denying rehearing en banc and rehearing by the panel is unreported, but reproduced at Pet. App. 53a.

The decision of the United States District Court for the District of Minnesota denying an initial motion to remand is reported at 342 F. Supp. 2d 826; the ultimate remand after express references to federal law were excised from the complaint is unreported, but available at 2005 WL 563111. The district court's decisions are reproduced at Pet. App. 30a-42a and Pet. App. 43a-52a, respectively.

JURISDICTION

Petitioners timely sought to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This Petition implicates the Federal Railroad Safety Act (49 U.S.C. § 20101, *et seq.*) and provisions of Title 28 affording federal question removal jurisdiction (28 U.S.C. §§ 1331 & 1441).

RESPONDENTS' STATEMENT OF THE CASE

The nation's railroads are the paradigm of interstate commerce, prompting this Court to long ago recognize that federal oversight "is practically indispensable to the operation of an efficient and economical national railway system." *S. Pac. Co. v. Arizona*, 325 U.S. 761, 771 (1945). Congress made that indispensable federal governance "exclusive" with the enactment of the Federal Railroad Safety Act ("FRSA").

The FRSA vests the Federal Railroad Administration ("FRA") with plenary authority to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103 (emphasis added). To safeguard against local interference Congress preempted all state laws based upon subject matters "covered" by FRA standards. 49 U.S.C. § 20106. This extraordinary preemptive force reflects both the supremacy of federal law and superiority of a unitary federal forum:

> [S]afety in the nation's railroads [is not] advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.
>
> * * *
>
> [Indeed,] the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. . . . To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109, 4110-11.

Petitioners decry the extension of federal jurisdiction to claims "covered" by FRA regulations, but every circuit opinion addressing the jurisdictional impact of the FRSA holds the preemption effected to be "complete" so as to permit removal. *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606, 607 (8th Cir. 2006); *Peters v. Union Pac. R.R. Co.*, 80 F.3d 257, 262 (8th Cir. 1996); *Rayner v. Smirl*, 873 F.2d 60, 66 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989).[1] In an attempt

[1] Complete preemption does not require that "covered" claims "must be removed," "may only be brought in federal court," or "must be heard in

to invent a schism in authority petitioners castigate the *Lundeen* court for not mechanically following other holdings that have cabined the jurisdictional implications of substantially different statutory schemes to cases in which federal remedies are substituted for preempted state claims. Pet. at 13-23.

Nothing about the distinct approaches to preemption that discrete statutes have produced is "compelling." Sup. Ct. R. 10. The jurisdictional boundaries of the FRSA cannot be surveyed through the prisms of divergent statutory regimes. On the contrary, the result is dictated by the language of the statute, and not surprisingly the FRSA's broad terms have prompted circuit courts to unanimously recognize the statute's complete preemptive effect. Furthermore, the Court has rejected the premise for this Petition: a federal remedy is not a prerequisite to the exercise of federal question jurisdiction by way of complete preemption or otherwise. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 317-18 (2005); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391 n.4 (1987).

With the circuit courts speaking as one and the federal remedy prerequisite a fiction, this case is not a worthy vehicle for illuminating the scope of federal jurisdiction; the path is already well lit.

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federal in federal court." Petition ("Pet.") at 2. Rather, as with all 28 U.S.C. § 1441 removals resort to a federal forum is at a defendant's option.

BACKGROUND

I. THE ACCIDENT

On January 18, 2002, a Canadian Pacific Railway train derailed near Minot, North Dakota. Amended Complaint, ¶ VIII.[2] Several tank cars carrying anhydrous ammonia released their lading. *Id.* According to petitioners:

> The Minot Derailment was caused by an ineffective and inadequate inspection and maintenance program by Defendant CPR. CPR's inspection and maintenance program failed to identify or replace cracked joint bars before those joint bars completely fractured.

Id. at ¶ XVII.

Petitioners seek redress for personal injuries and property damages allegedly sustained. *Id.* at ¶ XXXVIII.

II. THE ENSUING LITIGATION

This litigation ended up before the Eighth Circuit after a most circuitous jurisdictional journey. An overview of the complex proceedings below follows.

A. The first Minot derailment lawsuits.

Even before debris from the derailment could be cleared a putative class action was launched in North Dakota federal court. *See Mehl v. Canadian Pac. Ry. Ltd.*, 227 F.R.D. 505, 507 (D.N.D. 2005). A class encompassing these petitioners was later certified. *Id.* at 515, 522.

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[2] The pleadings determine whether the subject matter of the claims is "covered" for FRSA preemption purposes. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 665 (1993) (assuming the complaint "states a valid cause of action"). Thus the "facts" upon which the preemption analysis must be based are drawn from the complaint, reproduced in respondents' appendix ("Resp. App.") at 1a-19a.

Approximately one year after the accident, dozens of North Dakotans shopped individual lawsuits in a forum far from Minot – the Hennepin County, Minnesota district court. *See, e.g., Allende v. Soo Line R.R. Co.*, No. 03-3093, slip op. (D. Minn. Jan. 29, 2004) (Resp. App. at 20a-54a). The claimants fled their home state because North Dakota tort reforms curb punitive damages and eliminate joint and several liability. N.D. Cent. Code § 32-03.2-02; N.D. Cent. Code § 32-03.2-11(4).[3] Besides that, a jury drawn from metropolitan Minneapolis was perceived to be more sympathetic.

The state court lawsuits were promptly removed to federal court on complete preemption grounds. The federal court remanded, believing that removal jurisdiction is foreclosed by the FRSA's failure to afford a substitute federal remedy for the preempted state claims. *Allende*, slip op. at 18-20. Unfortunately, that denial of federal jurisdiction escaped appellate scrutiny. 28 U.S.C. § 1447(d).

B. The *Lundeen* district court proceedings.

Following *Allende*, litigation from Minot – including petitioners' cases – deluged the Minnesota court. The *Allende* precedent precluded removal of the subsequent case filings on complete preemption grounds. Petitioners, however, provided a path to the federal courthouse by pleading federal environmental claims. *Lundeen v. Canadian Pac. Ry. Co.*, 342 F. Supp. 2d 826, 829 (D. Minn. 2004). This group of cases was promptly removed.

The district court rejected petitioners' first request for remand because the federal claims expressed on the face of the complaints invoked federal question jurisdiction. *Id.* at 829-31. A second remand motion succeeded after petitioners

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[3] Petitioners' stratagem ultimately failed: the Minnesota state court rejected punitive damages and applied North Dakota law. *In re: the Soo Line Co. Derailment of Jan. 18, 2002 in Minot, ND*, No. MC 04-007726, slip op. at 1, 3 (Minn. Dist. Ct. Dec. 21, 2005) (Resp. App. at 55a-72a).

were allowed to purge all federal references. *Lundeen v. Canadian Pac. Ry. Co.*, No. 04-3220, 2005 WL 563111, at *3 (D. Minn. Mar. 9, 2005) (Pet. App. at 43a-52a). Because federal jurisdiction had been initially accepted the second remand order was discretionary and, therefore, appealable. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) (remands not pursuant to 28 U.S.C. § 1447 subject to appellate review); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 541-42 (8th Cir. 1996) (remand of supplemental state claims appealable).

C. The appellate proceedings.

The remand order was challenged as an affront to the forum shopping admonition in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988). After the briefing had closed, this Court affirmed the propriety of removal based upon underlying substantial federal questions, notwithstanding the absence of a parallel federal cause of action. *Grable*, 545 U.S. at 317-18. Shortly thereafter the Eighth Circuit decided *In re Derailment Cases*, which confirmed the pervasive implications of the FRSA in analogous derailment litigation. 416 F.3d 787, 793-94 (8th Cir. 2005). Reacting to these precedents the appellate court asked for supplemental briefing. *Lundeen v. Canadian Pac. Ry. Co.*, No. 05-1918, slip order (8th Cir. Feb. 13, 2006) (Resp. App. at 73a).

After further consideration the court enabled the jurisdictional effect of the FRSA to be realized. That result flowed from two Eighth Circuit pronouncements regarding the FRSA's complete preemption ramifications: *Peters v. Union Pac. R.R. Co.*, 80 F.3d 257 (8th Cir. 1996) (affirming removal); and *Chapman v. Lab One*, 390 F.3d 620 (8th Cir. 2004) (reversing removal). Prior to those decisions the Fourth Circuit had similarly recognized the jurisdictional effect of the FRSA. *Rayner v. Smirl*, 873 F.2d 60 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989).

Since the FRSA had already been understood to have complete preemptive effect, the *Lundeen* panel merely needed to assess whether FRA regulations "covered" the subject matter of the claims as was the case in *Peters* and *Rayner*, or not as in *Chapman*. *Lundeen*, 447 F.3d at 613-14. Using negligent inspection allegations as a template, the Eighth Circuit found petitioners' claims to be subsumed by numerous federal standards. In particular,

> federal regulations establish a specific inspection protocol including how, 49 C.F.R. § 213.233(b), when, §§ 213.233(c) & .237(a)-(c), and by whom, §§ 212.203, 213.7 & .233(a), track inspections must be conducted; the regulations establish a national railroad safety program intended to promote safety in all areas of railroad operations, § 212.101(a); federal and state inspectors determine the extent to which the railroads, shippers, and manufacturers have fulfilled their obligations with respect to, among other things, inspection, § 212.101(b)(1); and railroads face civil penalties for violations, § 213 App. B. It is clear the FRA regulations are intended to prevent negligent track inspection and there is no indication the FRA meant to leave open a state law cause of action.

Id. at 614 (emphasis added). This regulatory "coverage" of track inspections rendered the litigation removable.

At the Eighth Circuit petitioners entreated for the imposition of the same complete preemption prerequisite now heralded before this Court – *i.e.*, the substitution of a federal remedy for the preempted state claims. Following this Court's guidance the appellate court rejected petitioners' pleas and allowed the FRSA's preemptive force to displace "covered" claims:

> "The issue of whether complete preemption exists is separate from the issue of whether a private remedy is created under a federal statute. *Cater-*

> *pillar*[,482 U.S. at 391 n.4]. Complete preemption can sometimes lead to dismissal of all claims in a case. Although courts may be reluctant to conclude that Congress intended plaintiffs to be left without recourse, *see M. Nahas & Co., Inc. v. First National Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir. 1991), the intent of Congress is what controls. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 45, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (citations omitted)."

Id. at 613 n.4 (quoting *Gaming Corp.*, 88 F.3d at 542).

A petition for en banc reconsideration was turned away. Pet. App. 53a.

THE WRIT SHOULD BE DENIED

I. CIRCUIT COURTS AGREE ABOUT COMPLETE FRSA PREEMPTION

Complete preemption removal is firmly rooted in Supreme Court jurisprudence. The acknowledgement of complete preemption under the FRSA does not break new ground: the Fourth and Eighth Circuits have endorsed the statute's jurisdictional implications and no other circuit court has disagreed. Such unanimity is antithetical to the "compelling reasons" necessary to justify certiorari review. Sup. Ct. R. 10.

A. Complete preemption removal is well established.

Complete preemption arises when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). The doctrine is an exception

to the general bar against removal on account of a federal defense. *Id.*

The seminal precedent, *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, delineates the controlling analysis. 390 U.S. 557 (1968). The *Avco* union removed a strike injunction lawsuit, arguing that § 301 of the Labor Management Relations Act ("LMRA") overwhelmed the state law claim. *Id.* at 558-59. This Court agreed:

> An action arising under § 301 is controlled by federal substantive law even though it is brought in a state court. . . . It is thus clear that the claim under this collective bargaining agreement is one arising under the "laws of the United States" within the meaning of the removal statute.

Id. at 560 (citing 28 U.S.C. § 1441(b)).

Notably, the practical recourse available after removal was not a federal lawsuit; rather, the union was only accountable through a contractual dispute resolution process. The lack of judicial relief after removal was, nonetheless, irrelevant: "[t]he necessary ground of decision [in *Avco*] was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action [within its scope]." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983) (emphasis added). *Accord Metropolitan Life*, 481 U.S. at 64. Hence, the breadth of a federal statute's preemptive "power" – not the availability of federal redress – is the touchstone of complete preemption, as *Caterpillar* and *Grable* later confirmed. *See infra* at 18-23.

B. The FRSA makes railroad regulatory oversight nationally uniform.

The preemptive effect of the FRSA is no less than the statute considered in *Avco*. Congress federalized regulation of the nation's rail transportation system regulation as follows:

> Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order:
>
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106 (emphasis added). *Accord* 49 C.F.R. § 213.2.

Pursuant to this explicit mandate state law is displaced whenever "regulations issued by the Secretary cover the subject matter of the . . . allegations." *Easterwood*, 507 U.S. at 665 (emphasis added). *See also CSX Transp., Inc. v. Williams*, 406 F.3d 667, 672 (D.C. Cir. 2005) ("The FRSA preemption provision . . . authorizes the court only to determine whether the regulation covers the subject matter . . . .")

(emphasis in original). The statute's express displacement of state law could not be clearer or more powerful.

The genesis for FRSA preemption was the threat to interstate commerce posed by local oversight:

> [T]he railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. . . . To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4110-11 (emphasis added). Congress concluded that federal oversight would promote the safe operation of the nation's rail transportation system, a legislative judgment entitled to judicial obeisance.[4]

Giving effect to this purpose, the statute vests federal authorities with "exclusive" administration of railroad safety regulations. 49 U.S.C. § 20111(a). To protect against the parochial tendencies of state regulators, courts and juries, governmental authorities are singularly charged with FRA enforcement, and the forum for that enforcement is expressly federal. 49 U.S.C. § 20112 (authorizing federal court recourse by the United States Attorney General); 49 U.S.C. § 20113(a) & (b) (authorizing limited federal court action by a participating "State authority" if federal authorities fail to

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[4] Significantly, the complete preemptive effect of railroad legislation is not newly recognized. The Railway Labor Act and Interstate Commerce Act have both been held to completely preempt state claims. *Deford v. Soo Line R.R. Co.*, 867 F.2d 1080, 1084-85 (8th Cir.) ("We believe that the fundamental question is whether the RLA or the ICA so pervasively occupy the field of railroad governance that a competing state law claim necessarily invokes federal law."), *cert. denied*, 492 U.S. 927 (1989).

act). The statute contemplates litigation no place other than in federal court and subject exclusively to federal law.

C. Federal court is open for completely preempted FRSA claims.

The Fourth and Eighth Circuits are in synch: the FRSA is "so powerful" as to enable removal. *Rayner* was the first to recognize the statute's complete preemptive effect. In that wrongful discharge action the employee sought to elude the National Railroad Adjustment Board by suing in state court. *Rayner*, 873 F.2d at 62-63. The case was removed and remand denied. *Id.* at 63.

In affirming the jurisdictional ramifications of the FRSA the unanimous panel heeded Congress's judgment that "railroad safety is better served by uniform federal action rather than 'by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.'" *Id.* at 65 (quoting H.R. Rep. No. 91-1194, *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109).[5]

The court reasoned:

> Congress' desire for national uniformity in railroad safety practices clearly is implicated by Rayner's common law claims. In one sense, of course, all the trier of fact need do in a wrongful discharge action is determine the reason for the discharge. In another sense, however, Rayner's claim of wrongful discharge for "whistleblowing" is inextricably

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[5] *Rayner* addressed the previous codification of preemption at 45 U.S.C. § 434; the renumbering of the preemption provision to 49 U.S.C. § 20106 was implemented "without substantive change." H.R. Rep. No. 103-180, (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818. The lack of substantive change was recognized by this Court when the § 20106 iteration of FRSA preemption was given identical treatment in *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000) as the previous preemption provision – § 434 – considered in *Easterwood*.

> tied to the question of precisely what railroad safety practices he was blowing the whistle on. To the extent that the justifiable nature of the whistle-blowing enters the calculus in wrongful discharge actions, railroad safety laws might be subject to an unpredictable medley of jury determinations, which Congress, in its quest for national uniformity under [the FRSA], sought to avoid.

Id. at 66.

Because "[c]ongressional intent in the FRSA is clear," the applicable whistleblower regulation completely preempted parallel common law claims. *Id.* at 63-66.[6] That Fourth Circuit holding follows exactly the statutory directive.

Peters was the next circuit court precedent to allow the FRSA's preemptive reach to be realized. 80 F.3d at 260-62. The *Peters* plaintiff contested the railroad's refusal to return his engineer certificate by suing for conversion. After removal the preemptive realm of the FRSA was enforced in furtherance of the statutory intent to shut state courts out of railroad regulatory enforcement. *Id.* at 261 n.2 ("The FRSA's legislative history also emphasizes that railroad safety is better served by uniform federal action rather than by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.") (quotation omitted). As in *Rayner*, complete preemption was deemed to reign whenever the subject matter of a state law claim is "covered" by FRA regulations. *Id.* at 261.

The appellate court found the certification process to be subsumed by numerous FRA promulgations, in particular 49

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[6] Although the Fourth Circuit reflected upon the "comprehensive remedial scheme for aggrieved railroad employees" provided by the relevant regulations, the appellate court engaged in that exercise only "to confirm its preemptive scope." *Id.* at 65. The words of the statute, not the provision of an administrative remedy, were dispositive.

C.F.R. §§ 240.401-.411. *Id.* at 261-62. Such "coverage" completely preempted plaintiff's tort claim and afforded federal jurisdiction. *Id.* at 262.[7] Removal was, therefore, affirmed.

In the wake of *Rayner* and *Peters*, the *Lundeen* court readily acknowledged the FRSA's jurisdictional implications. 447 F.3d at 612-13. In doing so the Eighth Circuit dismissed the contention that a federal remedy must be provided before complete preemption will lie. *Id.* at 613 n.4. Rather, complete preemption prevails upon the finding that the subject matter is "covered" by FRA regulations. *Id.* at 613-14.[8]

In all, three circuit court decisions have assessed FRSA complete preemption, and each has sustained removal. The only ostensibly contrary authority petitioners could muster is *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568 (5th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005), and even then the case is mentioned only in passing. *Smallwood* arises from a car/train accident removed on diversity grounds despite the joinder of a non-diverse co-defendant. *Id.* at 571-72. The district court concluded that diversity jurisdiction attached because the joinder was fraudulent.

Addressing only the propriety of joinder, an en banc Fifth Circuit sent the case back to state court. *Id.* at 576. The opinion did not address, much less apply, complete preemption. *Id.* at 575-76 ("The railroad could not remove on the

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[7] Like in *Rayner* the Eighth Circuit noted in dicta that some of the "covering" regulations contemplated an administrative resolution of certification disputes. *Id.* at 261. These rules "serve[d] to confirm [the FRSA's] preemptive scope," not to establish the threshold for complete preemption. *Id.*

[8] Between *Peters* and *Lundeen* the Eighth Circuit acknowledged complete FRSA preemption in *Chapman*, but concluded that the claims in question were not "covered." 390 F.3d at 629. Without "coverage," preemption could not prevail.

basis of federal question jurisdiction because the only federal question appeared as a defense."). Thus there is no conflict to resolve; the improper joinder decision in *Smallwood* is not discordant with the *Rayner/Peters/Lundeen* harmony.[9]

D. Non-FRSA precedents do not repel the statute's jurisdictional force.

Petitioners contrive a circuit split by referencing the application of different statutes in obviously distinguishable cases. Pet. at 12-17. This ruse fails in its premise because the preemptive effects of distinct statutes cannot corral the FRSA's jurisdictional ramifications. *See, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 446 (2005) ("[C]ourts [have] too quickly concluded that failure-to-warn claims were pre-empted under [the Federal Insecticide, Fungicide, and Rodenticide Act], as they were [under the Public Health Cigarette Smoking Act], without paying attention to the rather obvious textual differences between the two pre-emption clauses.").

For example, petitioners take the FRSA analysis in *Lundeen* to task with *Beneficial Nat'l Bank v. Anderson*, which applied the National Bank Act ("NBA"). 539 U.S. 1 (2003). Importantly, the NBA does not expressly preempt state law; instead, its limits on interest rates and contemplation of claims are deemed to displace conflicting state law actions. *Id.* at 9-11. In assessing the NBA's complete preemptive

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[9] The petitioners also pronounce the FRSA to be "a particularly unsuitable candidate for complete preemption [because of] the fine lines and particularized factual determinations that often divide the preempted tort claim from the non-preempted claim." Pet. at 20. But the operative "coverage" analysis is driven by the pleadings, not by "particularized factual determinations." *Easterwood*, 507 U.S. at 665 ("The sole issue here is preemption, which depends on whether the regulations issued by the Secretary cover the subject matter of the two allegations, each of which we may assume states a valid cause of action.") (emphasis added).

effect the Court considered federal cause of action availability, but because NBA preemption must be implied the federal relief merely reflected Congress's preemptive intent in the absence of a complete or clear preemptive mandate. *See also infra* at 18-23. By no means did the Court announce a new prerequisite to complete preemption applicable to all federal schemes.

The FRSA is substantially different. Congress displaced all "covered" state law claims with 49 U.S.C. § 20106. Consequently, the analysis does not depend upon additional evidence to divine preemptive intent. Regardless, all evidence points to an unmistakable congressional purpose to preclude railroad oversight interference by state authorities, including the courts. *See, e.g.*, H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4110-11 ("To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce."). The express language and clear legislative history obviate the need to discern congressional intent from the nature of relief available after removal, contrary to the statute at issue in *Beneficial Nat'l Bank.*

Petitioners also embrace authorities like *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785 (7th Cir. 2002). But *Rogers* addresses the Poultry Products Inspection Act ("PPIA"), which is far more limited than the FRSA. Among other differences, the PPIA circumscribes preemption to state laws that seek to enforce standards "in addition to, or different than" the established federal standards. 21 U.S.C. § 467e. In other words, PPIA preemption is not invoked so long as charges of negligence are consistent with the standard of care imposed by the applicable federal regulation.

In contrast, the FRSA preempts all state claims regardless of whether they are different from or in addition to FRA mandates. *See, e.g., Shanklin*, 529 U.S. at 358 (if regulatory

"coverage" exists, "[i]t is this displacement of state law concerning the [subject matter], and not . . . adherence to the federal standard . . . that preempts state tort actions") (emphasis added). This wholesale preemption of all "covered" claims is far more expansive than the PPIA's "not in addition to or different than" preclusion of state law. Consequently, the extent of the FRSA's preemptive effect cannot be measured by inapposite authorities like *Rogers*.

Again, the discrete statutory language controls when preemption is express. As a result, the terms of more constrained preemptive provisions cannot define § 20106's impact on this litigation. Obvious textual distinctions prevent analyses applicable to dissimilar legislation from being projected onto the FRSA in order to contrive the supposed conflict upon which this Petition is based.

E. Certiorari review is not justified.

The Court has long recognized the doctrine of complete preemption, and *Lundeen* brings the total of appellate precedents that have enforced the FRSA's complete preemptive effect to three. There is no jurisprudential need for the Court to weigh in on this most recent application of well-established authority. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

No circuit court has ever rejected, much less distinguished, *Rayner*, *Peters*, or *Lundeen*, and those decisions are firmly rooted in the FRSA's purposes. Accepting review on the basis of divergent non-FRSA authorities would be disruptive: the mere possibility that claims might experience a different outcome under an inapplicable and substantively different preemptive scheme would become the rationalization for certiorari review. The issue that drives the analysis is the displacement of state law effected by the FRSA, not the result that might be produced by some other statute's preemption provision. Until

there is a true FRSA conflict among the circuits the Court has no reason to squander certiorari review on *Lundeen*'s application of complete preemption. Sup. Ct. R. 10.

II. FEDERAL REMEDY AVAILABILITY IS NOT DISPOSITIVE

Certiorari review would not be warranted even if the conflict conjured up by petitioners was more than a chimera. The Court has taught that post-removal relief controls neither the complete preemption calculus nor any other federal question determination. This FRSA litigation is not an appropriate vehicle for the Court to impose an absolute condition upon the invocation of federal jurisdiction, especially when the Court has already spoken to the contrary.

A. A substitute federal remedy is not the jurisdictional *sine qua non.*

Petitioners want federal remedy availability to be the passport for removal. That result would re-write *Avco*, in which the Court blessed removal of a labor dispute despite federal law preclusion of the relief sought. 390 U.S. at 560-61. From that very beginning the opportunity to secure satisfactory redress after removal has not been a predicate to federal jurisdiction: "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy." *Id.* at 561.

Avco reiterated this critical distinction to emphasize the removability of precluded state claims even though the displacing federal statute affords no satisfactory remedy: "[T]he breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Id.* In the Court's view, "[a]ny error in granting or designing relief 'does not go to the jurisdiction of

the court.'" *Id.* (quoting *Swift & Co. v. United States*, 276 U.S. 311, 331 (1928)) (citation omitted).

The federal jurisdiction / federal relief distinction was amplified in *Caterpillar*, which arose out of a contract action venued in state court. 482 U.S. at 390. The complaint sought redress under California law, but the defendant removed to federal court because the individual employment arrangements had been merged into collective bargaining agreements. *Id.* The district court retained jurisdiction and dismissed for failure to state an LMRA claim. *Id.*

The Ninth Circuit reversed for reasons that mirror petitioners' argument to this Court:

> A state law cause of action has been "completely preempted" when federal law both displaces and supplants the state law – that is, when federal law provides both a superseding remedy replacing the state law cause of action and preempts that state law cause of action. . . . These are two distinct inquiries, both of which must be satisfied to permit removal of an action to federal court.

Williams v. Caterpillar Tractor Co., 786 F.2d 928, 932 (9th Cir. 1986) (emphasis in original). The rationale was explained as follows:

> Although this argument [that a federal remedy is not necessary for removing completely preempted claims] is persuasive, and not directly contradicted by the Supreme Court's decision in *Franchise Tax Board*, we decline to follow it. It has long been the law in this circuit that removal jurisdiction lies only when federal law supplants, as well as displaces, state law. The existence of a substitute federal remedy, in addition to preemption, is required by our precedent.

Id. at 932 n.2.

This Court flatly rejected the suggestion that "a case may not be removed to federal court on the ground that it is completely pre-empted unless the federal cause of action relied upon provides the plaintiff with a remedy." *Caterpillar*, 482 U.S. at 391 n.4. Conditioning removal jurisdiction upon the provision of a federal remedy was "squarely contradicted by [this Court's] decision in *Avco*." *Id.* *Avco* was read to have

> held that a § 301 claim was properly removed to federal court although, at the time, the relief sought by the plaintiff could be obtained only in state court. We reasoned as follows: "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy. . . . [T]he breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter.". . . Thus, although we affirm the Court of Appeals' judgment, we reject its reasoning insofar as it is inconsistent with *Avco*.

Id. (quoting *Avco*, 390 U.S. at 561).[10]

Avco and *Caterpillar* belie the argument that complete preemption is conditioned upon a substitute remedy being at hand. Like the Eighth Circuit, the Solicitor General wholeheartedly supports that conclusion:

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[10] Petitioners urge the adoption of authorities like *Schmeling v. NORDAM*, 97 F.3d 1336 (10th Cir. 1996) to promote a federal remedy removal prerequisite. But that court's open hostility to *Caterpillar* exposes the jurisprudential flaws upon which *Schmeling* and its brethren are based. *Id.* at 1341 (*Caterpillar* "strayed from the narrow path"); *id.* ("*Caterpillar* neglected the emphasis in the previous cases . . . "); *id.* at 1343 ("Rightly or wrongly, the Supreme Court read the 'superseding remedy' language as contrary to *Avco*'s holding that the nature of the relief available is irrelevant to the jurisdictional question.") (emphasis added).

> *Avco* demonstrates that a plaintiff's ostensible state-law claim may come within the scope of a federal cause of action and be completely preempted, even if the cause of action does not provide the plaintiff with a remedy. *Caterpillar*, 482 U.S. at 391 n.4. *Avco* thus supports an argument that a plaintiff's claims may fall within the scope of a federal cause of action and be completely preempted, even if the plaintiff is unable to state a valid claim under the cause of action, provided that the plaintiff's claim is within the field regulated by the cause of action.

Brief for the United States as Amicus Curiae, *Davis v. Int'l Union, United Automobile, Aerospace & Agriculture Implement Workers of America*, at 19 (U.S. May 2006) (No. 05-107) (Resp. App. at 74a-100a) (emphasis added) (internal citation omitted).

The Solicitor General's reasoning shows the way: "[W]hen the limits on the federal cause of action are an integral part of the federal scheme, it would seem counterintuitive to find a claim to be not completely preempted precisely because it seeks relief antithetical to the pervasively federal regime." *Id.* For the same reason this case cannot become the means for diminishing the FRSA's preemptive effect exactly because the statue's preempting force is, in fact, "complete." The enactment's pervasive scope allows for no state law governance of railroads; that congressional judgment must be respected.

B. *Grable* lays the federal remedy prerequisite contentions to rest.

Avco's recognition that federal jurisdiction is not dependent upon federal remedy availability was endorsed by *Grable*, which arose out of a quiet title action calling an IRS property seizure into question. 545 U.S. at 310-11. Although the claim was a creature of state law, removal jurisdiction was invoked based upon the inherent federal question. *Id.*

This Court affirmed jurisdiction because substantial federal issues were implicated even though no federal remedy was provided. *Id.* at 314-15. *Grable* eschewed the suggestion that an alternative federal remedy alone affords federal forum access. *Id.* at 317-18 (discussing *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804 (1986)). Instead, the Court reminded that *Merrell Dow* had "disclaimed the adoption of any bright-line rule" and "treat[ed] the absence of a federal private right of action as evidence relevant to, but not dispositive of, the sensitive judgment about congressional intent that § 1331 requires." *Id.* at 317 (emphasis added). The "primary importance" of federal remedy unavailability in *Merrell Dow* only "emerged when the Court treated the combination of no federal cause of action and no preemption of state remedies for misbranding as an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331." *Id.* at 318 (emphasis added). In contrast, § 20106 expressly preempts state law of all stripes as soon as regulatory "coverage" is extended.

Grable's treatment of general § 1331 jurisdiction follows the specific complete preemption doctrine applied in *Avco*, *Caterpillar*, and the decision below. Those precedents reject a federal remedy as talismanic of federal jurisdiction. Unlike in *Merrell Dow* and cases like *Beneficial Nat'l Bank*, the absence of a parallel remedy in the FRSA adds nothing to the comprehensive preemption that Congress necessarily effected by displacing all "covered" state claims. The statute's unequivocal language obviates the need to search for clues about congressional intent as might be required when legislation is less explicit, like with the NBA.

C. Settled precedent challenges do not warrant certiorari review.

The scope of preemption expressed by the FRSA could not be more broad. All that is necessary is regulatory "coverage." To the extent circumstantial evidence about legislative intent

is apposite, the jurisdictional mandate is evident without regard to a parallel remedial scheme:

> [S]afety in the nation's railroads [is not] advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.
>
> * * *
>
> [Indeed,] the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. . . . To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109, 4110-11.

In the words of the Solicitor General, to hamstring the preemptive effect of the FRSA precisely because petitioners seek "relief antithetical to the pervasively federal regime" would be perverse. The Eighth Circuit's refusal to graft a federal remedy prerequisite onto the removal jurisdiction afforded by FRSA complete preemption complies with this Court's admonishments in *Avco*, as born out in both *Caterpillar* and *Grable*. As such, the Eighth Circuit did not come close to departing "from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10. The Court does not need to make jurisdictional pronouncements that would simply reaffirm existing law.

CONCLUSION

Because there is no circuit conflict regarding the FRSA's jurisdictional effect, and because the Court has already rejected the imposition of a federal remedy prerequisite upon complete preemption and all other federal question jurisdiction, the Petition should be denied.

Respectfully submitted,

TIMOTHY ROBERT THORNTON
Counsel of Record
SCOTT G. KNUDSON
KEVIN M. DECKER
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

Attorneys for Respondents Canadian Pacific Railway Company, et al.

APPENDIX

APPENDIX A

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Tom Lundeen, individually, and Nanette Lundeen, individually, and Tom Lundeen and Nanette Lundeen on behalf of, and as parents and natural guardians of Molly Lundeen, a minor, and Michael Lundeen,

Plaintiffs,

-vs-

Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited and Soo Line Railroad Company,

Defendants.

Court File No._____
Case Type: Personal Injury

COMPLAINT AND DEMAND FOR JURY TRIAL

COMES NOW the Plaintiffs and bring this action for personal injury and property damage against the Defendants, and in furtherance of these claims, allege and state a follows:

I.

The Plaintiffs are Tom Lundeen, individually, and Nanette Lundeen, individually, ant Tom Lundeen and Nanette Lundeen, on behalf of and as parents and natural guardians o: Molly Lundeen, a minor, and Michael Lundeen, who was a minor at the time, who al resided at 716 36th Street S.W., Minot, North Dakota on January 18, 2002, and assert that they were injured and damaged in their person and property on that date as a result o: actions or inactions by the Defendants.

II.

Defendant, Soo Line Railroad Company is a corporation duly organized and existing under the laws of the state of Minnesota with its principal place of business located at 501 Marquette Avenue, Minneapolis, Minnesota.

III.

Defendant, Soo Line Railroad Company is a wholly-owned subsidiary of Defendant, Canadian Pacific Railway Company which, in turn, is a wholly-owned subsidiary of Defendant, Canadian Pacific Limited. Defendant, Canadian Pacific Railway Limited, is a Canadian corporation and a related company to the other Defendants. All of these Defendants did business in the state of Minnesota at relevant times to this cause of action. Defendants, Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited, and Soo Line Railroad Company were all related companies and bear the responsibility and fault for the train derailment subsequently described in paragraph VIII. These Defendants shall be hereinafter collectively referred to as "Defendant CPR."

IV.

Defendant CPR is a duly licensed railroad in the United States and authorized to operate a system of railroads as a common carrier of freight in and through the states of North Dakota and Minnesota and including Hennepin County, Minnesota, as well as in other states in the United States of America and in Canada.

V.

Defendant CPR is subject to the rules, regulations, governance and obligated to comply with all regulations of the United States of America including the Federal Railroad Administration (FRA) and subject to, among other obligations, compliance with

FRA regulations and the Code of Federal Regulations (CFR) and all other regulations of the states of North Dakota and Minnesota and the United States of America for the operation of a railroad.

VI.

Defendant CPR is subject to the jurisdiction of this court in that the headquarters of Defendant CPR in the United States is located in Hennepin County, Minnesota, and critical decisions made by Defendant CPR were made in Hennepin County, Minnesota, including management decisions concerning track installation, track maintenance, assignment of personnel, allocation of resources, train operations, regulatory compliance and all manner of decisions affecting equipment, operations and resources of Defendant CPR.

VII.

Defendant CPR operates a railway that extends from beyond Medicine Hat, Alberta, Canada, to beyond St. Paul, Minnesota, and which runs northwest to southeast through the state of North Dakota. The track in North Dakota is part of the St. Paul Service Area. That portion of the track in the St. Paul Service Area in northwestern North Dakota is denoted as the Portal Subdivision. That portion of the track in the Portal Subdivision from approximately Kenmare, North Dakota, to approximately Minot, North Dakota, is denoted as the Kenmare Section. The derailment described in paragraph VIII occurred in the St. Paul Service Area, Portal Subdivision, Kenmare Section of Defendant CPR's main line track.

VIII.

At approximately 1:37 A.M. on January 18, 2002, an eastbound CPR freight train, designated 292-16, traveling about 41 miles per hour, derailed 31 of its 112 cars approximately one-half mile west of the city limits of Minot, North Dakota, at a location designated as MP ' 471.65. Five

tank cars containing liquefied anhydrous ammonia catastrophically ruptured, instantaneously releasing approximately 146,700 gallons of anhydrous ammonia. Seven pressurized tank cars were damaged, which subsequently lost some or all of their contents, resulting in an additional release of approximately 74,000 gallons of liquefied anhydrous ammonia, for a total release of anhydrous ammonia of approximately 221,000 gallons. This incident shall hereinafter be referred to as the "Minot Derailment."

IX.

At all times relevant, to the Minot Derailment, the train, track, ballast, sub-ballast, lading, equipment, maintenance, operations and personnel were all under the governance, supervision, administration and control of Defendant CPR, but subject to regulatory provisions of state and federal law.

X.

The tracks at the location of the Minot Derailment were classified as FRA Class 3 Track with a maximum speed limit for freight trains of 40 miles per hour, subject to a lower but not higher speed by regulation or CPR order. The CPR train designated 292-16 was travelling in excess of the authorized track speed at the time and location of the Minot Derailment, in excess of a reasonable speed for conditions at the time of the Minot Derailment, and in excess of a proper speed by regulation.

XI.

The tracks in the Kenmare Section were represented and contended to be continuous welded rail, a designation which purports to be and represents a claim that the rail is without joints, splices or plugs. In fact, at the time of the Minot Derailment between mile post 471 and 472, there were ten or more joints representing five or more plugs, which did not meet the definition of continuous welded rail and which, in

turn, affects authorized and reasonable speed of trains. Joints are, and it is well known to Defendant CPR, much weaker and more prone to failure than continuous welded rail.

XII.

The track at the time and place of the Minot Derailment was 100-pound rail, which is the lightest weight rail in use in the Defendant CPR's rail system. Defendant CPR has over 14,000 miles of track in its system with only 65 miles of 100-pound rail on its main line track. The entire 65 miles of 100-pound rail in CPR's rail system is found in North Dakota and two-thirds of it is located in the Kenmare Section, the remainder being in the adjoining section southeast of the Kenmare Section. 100-pound rail is considered lightweight rail not suitable for use on main lines that bear the amount of traffic experienced by the track in question. The Defendant CPR has increased track usage from approximately fifteen million tons per year in 1992 to twenty-five million tons per year, and this increased traffic heightens and increases the probabilities of failure, particularly with the 100-pound lightweight rail.

XIII.

The track at the time and place of the Minot Derailment was installed in 1973, but was not new at the time of its installation, having been salvaged from another location believed to be in Wisconsin. The rail had been manufactured sometime in the 1950's-making it nearly fifty years old. Further, the rail was worn, brittle and problematic. As a result, the rail required frequent repairs as defects were discovered, which Defendant CPR chose to repair by installing plugs, creating two joints per plug instead of welding. The height of the plugs used by Defendant CPR do not match the height of the existing worn rail which, in turn, puts additional stresses on the joints and increases the probability, if not likelihood, of catastrophic derailments.

Plugs are far less safe than welding but less expensive to CPR. CPR knew plugs were less safe but chose them to save money.

XIV.

Defendant CPR is aware of and acknowledges that rail containing joints is more likely to have separations, gaps, pull-aparts, breaks or other failures during extremely cold weather. Yet, during these times Defendant CPR furloughed track maintenance workers and declined to perform normal track maintenance, walking inspections or other inspections designed to determine the presence of problems at joints, including (but not limited to) cracked or broken joint bars, bent or loose bolts, rail end batter and other clear indications of problems likely to result in catastrophic derailments.

XI.

Defendant CPR has conducted a systematic and planned reduction in force, including reducing personnel intended to maintain and service its main line track in North Dakota. CPR further designated work to the remaining maintenance personnel in such a way as to prevent or severely curtail welding of temporary joints. Defendant CPR further discontinued the use of inspection and ultrasonic testing devices which had, as their purpose, the identification of cracked or broken joint bars. The use of such inspection and testing devices had been implemented by CPR following the hereinafter described Burlington Derailment which occurred in 1994, and which was caused by the same negligent acts or omissions as those that caused the Minot Derailment.

XVI.

Defendant CPR had adopted standards and practices for its track, track maintenance, equipment and other matters relating to the main line track effective for the time and place of the Minot Derailment. Defendant CPR failed to adequately

train, inform, test or otherwise implement and verify that its practices and procedures had been learned and implemented by its personnel prior to the Minot Derailment.

XVII.

The Minot Derailment was caused by an ineffective and inadequate inspection and maintenance program by Defendant CPR. CPR's inspection and maintenance program failed to identify or replace cracked joint bars before those joint bars completely fractured. This cracking led to a rail separation, causing CPR train designated 292-16 to derail which, in turn, caused the failure of pressurized tank cars releasing 221,000 gallons of anhydrous ammonia, which blanketed the area adjacent to the tracks and engulfed many homes in the Minot and Minot area.

XVIII.

The Minot Derailment was caused by two broken joint bars at a joint located at mile post 471.65 in Defendant CPR's Kenmare Section which was designated by its configuration as a "temporary" joint. The broken joint bars were installed in the north rail at milepost 471.65 in May of 2000. Joints designated as temporary should be welded as soon as practical, but certainly within thirty days of installing the joint bars. CPR failed to weld the temporary joint for more than 20 months following its installation.

XIX.

The joint that failed and led to the Minot Derailment was repaired by CPR in the summer of 2001 when it was discovered that there were loose, bent or otherwise damaged bolts and nuts. Loose, damaged, bent or broken nuts and bolts are indicia of rail stress which, in turn, are indicia of likely or imminent failure of a joint, requiring prompt, if not immediate, welding of the rail and, in the interim, a reduction in speed to decrease the probability of a catastrophic

derailment. CPR failed to weld the temporary joint for more than six months following its repair and failed to reduce train speed.

XX.

The nuts and bolts at joints, whether temporary or permanent, are required to be torqued to 550-foot pounds. The nuts and bolts at mile post 471.65 were removed following the derailment and found to be 54-foot pounds, 126-foot pounds, 205-foot pounds and 402- foot pounds, all of which are far below the specification of 550-foot pounds for rail joint nuts and bolts and that loose nuts and bolts results in additional stresses on railed joints and which, in turn, lead to joint bar failure and resulting derailments.

XXI.

CPR has acknowledged that nuts and bolts are installed using pneumatic torque wrenches which are supposedly pre-set to 550-foot pounds. CPR, however, acknowledges that it does not check, reset, or otherwise verify that its torque wrenches are property set. CPR further acknowledges that occasionally nuts and bolts are installed, reinstalled or serviced using hand tools which do not measure torque, making it impossible to know whether the nuts and bolts are properly torqued.

XXII.

The bolts comprising the joint at mile post 471.65 showed evidence of fretting and were bent, indicative of stress on the joint in the form of longitudinal forces that cause or contribute to joint bar failure and resulting derailments.

XXIII.

The east end of the plug and the west end of the rail at mile post 471.65 both, showed evidence of batter far in excess of that permitted by Defendant CPR and far in excess of what is reasonable. Specifically, batter was not to exceed .015 inches

and at the time of the derailment was between .06 and _19 inches, which is between four times and fourteen times the amount of batter that should cause Defendant CPR to weld the joint into solid rail and which is further indicative of joint stress as well as likely or imminent joint failure and resulting derailments. CPR acknowledges that, notwithstanding this requirement, it failed to measure rail end batter and failed to provide necessary but basic devices to its inspectors for measuring batter

XXIV.

Rail end batter at joints to the degree found following the Minot Derailment develops over time. Therefore, the joint problems were evident for some time prior to the Minot Derailment.

XXV.

Defendant CPR's standards and practices require that adjoining rail and plugs must be fully box anchored at every tie for 195 feet from each joint. The joint at mile . post 471.65 was anchored only at every other tie and the old anchors were reinstalled following the insertion of the plug rather than installing new anchors. Anchors are intended to minimize longitudinal stresses and movement of the track and the installation of only one-half of the number of anchors necessary make more likely, if not inevitable, the failure of the joint and resulting derailments.

XXVI.

Defendant CPR failed to comply with applicable rules, regulations, standards, guidelines and practices including, but not limited to, rules and regulations of the Federal Railroad Administration, applicable provisions of the Code of Federal Regulations, Defendant CPR's own standard practice circulars and industry wide standards. These violations were as the result of and under the direction of the Defendant

CPR's management and were developed, examined, reviewed, implemented, or not, as the case may be, by management of Defendant CPR in Hennepin County, Minnesota with full knowledge that its equipment and personnel were placed in the impossible situation of trying to maintain safe track and train operations with woefully inadequate resources and commitment and that as a consequence, derailments were likely, if not inevitable.

XXVII.

On February 27, 1994, a derailment occurred on Defendant CPR's main line at mile post 477.1, which is approximately 5.5 miles west of the Minot Derailment on the same main line track and also in the Kenmare Section. The February 27, 1994, derailment resulted in a tanker car containing liquid butane bursting into flames and causing serious, permanent, devastating bum injuries to a then 16-year-old boy, and for which Defendant CPR compensated that 16-year-old boy. This derailment shall herein be referred to as the "Burlington Derailment."

XXVIII.

The Burlington Derailment, like the Minot Derailment, was caused by undiscovered fractured joint bars, inadequate inspection, inadequate repair and essentially the same causes as the Minot Derailment.

XXIX.

Investigation of the Minot Derailment concluded numerous irregularities and defective conditions were known prior to, and after, the Burlington Derailment, and certainly before the Minot Derailment. Said deficiencies and irregularities are identical or very similar to the deficiencies and irregularities that caused the Minot Derailment. As a result, Defendant CPR knew or should have known well the consequences of such deficiencies and irregularities as evidenced by the

catastrophic injuries to the 16-year-old boy in the Burlington Derailment.

XXX.

Subsequent to the Burlington Derailment, Defendant CPR instituted a program of welding joints in the Kenmare Section into continuous welded rail. Defendant CPR then discontinued that welding program and, as a result, numerous joints existed in the Kenmare Section and including at least ten joints between mile post 471 and 472 at the time of the Minot Derailment.

XXXI.

Following the Burlington Derailment, Defendant CPR instituted a procedure where hand-held ultrasonic devices were used to identify cracked or broken joint bars. The ultrasonic testing of joint bars was discontinued sometime prior to the Minot Derailment, while at the same time Defendant CPR continued to install additional plugs. Other than walking inspections and ultrasonic testing of joint bars, there is no effective means for inspecting joint bars for cracks and failures. The inspection system used by Defendant CPR at the time of the Minot Derailment and for many years before, was ineffectual, unreliable and known by Defendant CPR to be such. Notwithstanding that information, Defendant CPR failed to implement an effective means of inspection and/or testing of joint bars and elimination of joints in a timely manner by welding.

XXXII.

Prior to the Minot Derailment, Defendant CPR suffered a derailment in 1988 near Bordulac, North Dakota, on the same main line track, which resulted in a derailment of tank cars carrying anhydrous ammonia. This derailment caused the release of large quantities of anhydrous ammonia in a rural area and resultant contamination of air and soil.

XXXIII.

Defendant CPR has experienced three derailments on its main line in North Dakota, each resulting in catastrophic failure of pressurized tank cars, and the release of hazardous and toxic chemicals with resultant serious personal injury and property damage. Yet, it failed to adequately inspect and maintain its track in a conscious disregard to public health and safety with known disastrous consequences and with little or no apparent concern for public safety or property, putting profits ahead of and in place of public safety.

XXXIV.

Defendant CPR, following the Burlington Derailment, reduced its train speeds from 40 miles per hour to 25 miles per hour in the Kenmare Section. Subsequently, in 1998, Defendant CPR eliminated the joints in the main line by welding. Thereafter, Defendant CPR increased the speed of its trains to 40 miles per hour. The increase in speed revealed numerous defects which, in turn, resulted in the insertion of numerous plugs into the main line. At the same time, Defendant CPR decreased welding of joints and discontinued ultrasonic testing which, in turn, created the same situation that existed at the time of the Burlington Derailment, thereby making it inevitable that a subsequent catastrophic derailment would occur again. Even so, Defendant CPR continued to maintain its speed at 40 miles per hour with full knowledge of the risk of catastrophic consequences and that a derailment was almost certain.

XXXV.

The area of the Minot Derailment is "dark territory" which is track that has no system for automatically notifying or warning Defendant CPR if there is a pull-apart, break in the line or other problem. Defendant CPR has "signal territory" for most, if not all, of its other track. Track in "signal territory" which provides an automatic warning of track

separation or failure. By failing to provide signal in the area where the Minot Derailment occurred while, at the same time, reducing manpower, using 100-pound rail, reducing maintenance crews, reducing equipment, reducing inspections, increasing speed, installing numerous temporary joints, reducing welding of joints, eliminating ultrasonic testing, diverting manpower and resources to less critical purposes, and otherwise simply ignoring public safety and good operating practices, Defendant CPR created an unreasonable risk of derailments and resulting injuries and damages.

XXXVI.

Defendant CPR made conscious and deliberate choices and in disregard of known hazards and dangers with known consequences of catastrophic derailments and the resulting likelihood of death, severe personal injury and massive property damage.

XXXVII.

Defendant CPR made its decisions for the sole purpose of increasing profits and compensation of its executives and shareholders and at the expense and detriment of the public's safety, knowing all the while that their acts and omissions were wrongful and/or likely to result in derailments which, in turn, cause death, severe personal injury and massive property damage.

XXXVIII.

Plaintiffs have suffered serious personal injury, property damage, disability, impairment, medical expenses, lost income, lost productive time, unnecessary expenses and services, pain, suffering, economic and non-economic losses, for which they are entitled to compensation, having a value to be determined by the finder of fact.

XXXIX.

Plaintiffs allege that the acts or omissions of Defendant CPR warrant a finding for exemplary or punitive damages as determined by the finder of fact. Defendant CPR is put on notice that leave of court will be sought to amend these pleadings to assert a claim for exemplary or punitive damages

THE PLAINTIFFS REALLEGE ALL ALLEGATIONS SET FORTH PREVIOUSLY IN THIS COMPLAINT AS TO EACH COUNT HEREINAFTER STATED AS THOUGH EACH ALLEGATION WERE SET FORTH IN EACH COUNT

COUNT ONE

I.

The Minot Derailment was directly and proximately caused as a result of the negligence, gross negligence, carelessness, recklessness and willful, wanton, intentional and deliberate acts and omissions of the Defendant CPR.

II.

Defendant CPR acted with willful indifference, and deliberate and conscious disregard for the rights and safety of others by failing to properly inspect, maintain, replace and repair its tracks; by increasing track usage beyond that which the track could reasonably handle; by operating the train at the Minot Derailment in excess of track speed or in excess of a reasonable speed; by refusing to install and maintain signal in the territory; by refusing to adequately provide maintenance crews; improper allocating of resources; inadequate or lack of supervision or direction of employees and equipment; and other acts which caused its equipment to deteriorate into and remain in a defective and dangerous condition in close proximity to populated areas with full knowledge of the consequences of its acts and/or omissions

which included the probability of death, serious personal injury and massive property damage from train derailments.

III.

Defendant CPR is guilty of one or more of the following acts of negligence, carelessness, recklessness, and deliberate acts with willful indifference and reckless and conscious disregard to the rights and safety of others, including the Plaintiffs:

A. Failure to adopt, install, implement, train and enforce a safe method and procedure for the proper inspection, maintenance, upkeep and repair of the tracks, road bed, rails and equipment at the time and location of the Minot Derailment;

B. Failure to properly construct, inspect, maintain and repair the tracks, road bed, rails and other property including equipment and lading;

C. Failure to properly supervise, regulate and operate in North Dakota the safe movement of its engines, cars and lading;

D. Negligent operation of CPR train designated 292-16;

E. Failure to properly construct, inspect, repair and maintain the tracks, including the failure to hire or maintain a sufficient workforce to adequately and safely maintain the tracks when Defendant CPR knew the tracks were carrying hazardous, toxic, explosive, dangerous and ultra-hazardous material on tracks which are near people's homes while knowing that there was a high degree of probability, if not certainty, of death, serious personal injury and/or property damage;

F. Substantially increasing traffic loads on the Kenmore Section, while at the same time

installing numerous plugs or other repairs, curtailing or discontinuing welding and discontinuing use of inspections intended to find cracked or broken joint bars, on track that Defendant CPR knew or should have known could not handle the loads, usage or speeds imposed;

G. Failing to install a signal system which would notify Defendant CPR in the event of breaks or pull-aparts of its track;

H. Discontinuing the use of devices intended to identify cracks or breaks in joint bars;

I. Delaying, severely curtailing or discontinuing welding of joints for unreasonable lengths of time, even in the face of joint problems discovered and known to exist, or which should have been discovered;

J. Knowing of and ignoring, or purposefully ignoring, or implementing procedures and practices which Defendant CPR knew full well would not disclose or would allow dangerous or defective conditions to exist in its track which amount to purposeful avoidance of information affecting public safety and including inadequate training of personnel, non-measurement of rail end batter, inadequate, unmeasured torquing of bolts, excessive spacing between rail end and plug, non-walking inspections, non-use of ultrasonic joint bar testing devices, use of old, worn, deficient rail, improperly reusing rail, mismatching rail height, inadequate anchoring, ignoring bent, damaged nuts and bolts, inadequate or non-existent record keeping, unreasonably delaying of welding of joints, and other acts representing a conscious

disregard of facts or a conscious disregard of the likelihood of facts; and

K. Failing to adopt, implement and comply with necessary and required policies and procedures as required by state and federal law, and further failing to comply with requirements of state and federal law including, but not limited to, requirements of the FRA and CFR.

L. Other acts of negligence, carelessness, recklessness, willful, wanton and intentional and deliberate acts or failure to act which caused the Minot Derailment and, consequently, the damages suffered by the Plaintiffs.

COUNT TWO

IV.

Defendant CPR engaged in, at the time of the Minot Derailment, an ultra-hazardous or extra-hazardous activity, as defined by Minnesota law or the applicable law, and is strictly liable to the Plaintiffs for the damages suffered by the Plaintiffs while engaging in such activity.

COUNT THREE

V.

The Defendant CPR violated applicable state law, both North Dakota and Minnesota, as well as United States law, resulting in the release of hazardous substances and which amount to contamination, pollution, unauthorized release of hazardous material and other violations of applicable "environmental laws" and for which Defendant CPR is strictly liable for damages occasioned thereby, including, but not limited to, personal injury, property damage, statutory

penalties, actual attorney's fees, and other damages as specified in applicable environmental laws.

COUNT FOUR

VI.

The acts and omissions of Defendant CPR created a nuisance by the release of anhydrous ammonia, which damaged the Plaintiffs for which Plaintiffs are entitled to recover damages and all other remedies at law.

COUNT FIVE

VII.

Defendant CPR caused, allowed, or otherwise permitted lading under its exclusive control and direction to trespass onto the property and person of the Plaintiffs, resulting in damages to the Plaintiffs and their property for which Defendant CPR is liable.

COUNT SIX

VIII.

Defendant CPR was engaged in an abnormally dangerous activity: the transportation of hazardous material in populated areas. As such, Defendant CPR is subject to liability for harm to persons and property resulting from such activities even if Defendant CPR exercised the utmost care being strictly liable for damages suffered by the Plaintiffs.

COUNT SEVEN

IX.

Defendant CPR is liable to the Plaintiffs for their damages as the result of CPR's breaches of statutory rules and

regulations including, but not limited to, violations of FRA rules and regulations, violations of the Code of Federal Regulations, violations of Defendant CPR's standard practice circulars and other applicable state or federal law or administrative regulatory agencies of the states of North Dakota and Minnesota and the United States government.,

JURY TRIAL DEMANDED

Plaintiffs demand trial by the maximum number of jurors permitted by law.

PRAYER FOR RELIEF .

WHEREFORE, Plaintiffs pray for relief against Defendant CPR for damages for pain, suffering, disability, impairment, personal injury, property damage, economic and non-economic damages, mental anguish and all other damages proximately caused by Defendant CPR's wrongful acts or omissions for which Plaintiffs are entitled to compensation in an amount exceeding $50,000.00, together with attorney's fees, costs, disbursements herein, and penalties provided by applicable law, and for such other and further relief as the court deems just and equitable.

Dated this 28th day of June, 2004.

BY:
Collin P. Dobrovolny (ND License #03295)
Bryan L. Van Grinsven (ND License #05357 And MN License #261312)

MCGEE, HANKLA, BACKES & DOBROVOLNY, P.C.,
152nd Avenue SW - Wells Fargo Bank Center PO
Box 998
Minot, ND 58702-0998
Telephone No. (701) 852-2544
ATTORNEYS FOR PLAINTIFFS

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

[Filed Jan. 29, 2004]

CIVIL NO. 03-3093 (ADM/JSM)

MELISSA AND RICHARD ALLENDE,
Plaintiffs,

v.

SOO LINE RAILROAD COMPANY, a Minnesota corporation d/b/a Canadian Pacific Railway, and CANADIAN PACIFIC RAILWAY LIMITED, a Canadian Corporation
Defendants.

REPORT AND RECOMMENDATION

The above matter came on for hearing before the undersigned upon plaintiffs' Motion to Remand [Docket No. 8]. Daniel O'Fallon, Esq. appeared on behalf of the plaintiffs; Timothy Thornton, Esq. and Scott Knutson, Esq. appeared on behalf of defendants. The matter was referred to the undersigned by the District Court for a Report and Recommendation pursuant to 28 U.S.C. § 636 (b)(1)(B).

For the reasons discussed below, it is recommended that plaintiffs' Motion to Remand be granted.

FACTUAL BACKGROUND

On January 18, 2002, defendants were operating a freight train on a single track traveling eastbound. *See* Complaint, ¶ V. Plaintiffs claim that the freight train encountered a "rough patch" of track. *Id.* Subsequently, 31 of the freight train's cars derailed near Minot, North Dakota. *Id.* Seven of

the cars allegedly contained anhydrous ammonia that plaintiffs claim formed a cloud that blanketed the City of Minot, North Dakota, and the surrounding areas. Id. Plaintiffs claim they were exposed to the 2004 anhydrous ammonia that escaped into the air as a result of the freight train's derailment. *Id.* at ¶ IV. Plaintiffs brought an action in Minnesota District Court, Hennepin County, alleging that defendants' negligence resulted in their physical injury and emotional harm. Specifically, plaintiffs assert that the following actions by defendants led to the derailment and release of anhydrous ammonia:

- Failure to adopt, install, implement and enforce a safe method and procedure for the proper inspection, maintenance, upkeep and repair of its tracks, roadbed, property and rails;
- Failure to properly construct, inspect, maintain and repair its roadbed, tracks, rails and properties, including the failure to install appropriate weighted track, failure to weld joints, failure to install permanent joints when wielding would not be possible in a timely fashion, failure to inspect the track on a regular basis using appropriate available technology, such as the KrautKremer device;
- Failure to exercise due care in the operation, inspection, maintenance and repair of tracks:
- Transporting dangerous chemicals on tracks that defendants knew or should have known where dangerous, hazardous and certain to cause derailments; and
- Making the deliberate decision to reduce its workforce at the expense of maintaining its tracks, roadbed, rails and railway system.

See Complaint, ¶ XVI.

Plaintiffs allege no federal statutes as the basis for their

claims or any federal cause of action in their Complaint. Nevertheless, defendants removed plaintiffs' action to the United States District Court, District of Minnesota, under the complete preemption doctrine, relying on two federal statutes, the Federal Railroad Safety Act ("the FRSA") and the Interstate Commerce Commission Termination Act ("ICCTA"), for the basis of the removal. Plaintiffs have brought the present motion to remand to state court on grounds that complete preemption does not exist in this case because the FRSA and ICCTA do not create a private cause of action that replaces the plaintiffs' common law negligence claims.

DISCUSSION

I. Complete Preemption

Under 28 U.S.C. § 1441(b), an action filed in state court may be removed to federal court if the claim is one "arising under" federal law, i.e. arises under the Constitution, treaties or laws of the United States. In determining whether a claim arises under federal law, a court examines "the well pleaded' allegations of the complaint and ignore[s] potential defenses: 'a suit arises under the Constitution and the laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.'" *Beneficial Nat. Bank v. Anderson*, U.S., 123 S.Ct. 2058, 2062, 156 L.Ed.2d 1 (2003) (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908)) (citation omitted). In other words, the well-pleaded rule requires that federal jurisdiction be present on the face of a properly pleaded complaint in order to invoke the jurisdiction of the federal court. *See Gore v. Trans World Airlines*, 210 F.3d 944, 948 (8th Cir. 2000) (citation omitted).

An exception to the well-pleaded complaint rule is the complete preemption doctrine. *Id.* at 949; *see also Magee v. Exxon Corp.*, 135 F.3d 599, 601 (8th Cir. 1998) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct.

2425, 2430, 96 L.Ed.2d 318 (1987)). "The complete pre-emption doctrine converts an ordinary state-law claim into a federal claim where 'the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Gore*, 210 F.3d at 948 (quoting *Catepillar Inc.*, 482 U.S. at 393, 107 S.Ct. 2425, quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58. 65, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). Under the complete preemption doctrine, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore, arises under federal law." *Magee*, 135 F.3d at 601 (quoting Caterpillar Inc., 482 U.S. at 393. "Congressional intent is the touchstone of the complete preemption analysis." *Id.* at 601; *see also Minnesota ex rel. Hatch v. Worldcom, Inc.*, 125 F.Supp.2d 365, 369 (D. Minn. 2000) ("'[T]he touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the pre-emption defense but the intent of Congress.") (quoting *Metropolitan Life*, 481 U.S. at 66, 107 S.Ct. at 1548)).

"When reviewing a motion to remand, a court must resolve all doubts about federal jurisdiction in favor of remand." *Blaylock v. Hynes*, 104 F. Supp.2d 1184, 1186 (D. Minn. 2000) (citing *In re Bus. Men's Assurance Co of Am.*, 992 F.2d 181, 183 (8th Cir. 1993)). "Because of the obvious federalism implications of the complete-preemption doctrine, its application has been extremely limited by the courts." C. Wright, A. Miller, and E. Cooper, 14B Federal Practice and Procedure: Jurisdiction 3d § 3722.1, at 517 (1998). Consequently, it is a conclusion courts reach reluctantly. *Moline Machinery, Ltd. v. Pillsbury Co.*, 259 F. Supp.2d 892, 896 (D. Minn. 2003) (quoting *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir. 1996)).

Plaintiffs are seeking damages for personal injury and emotional distress arising out of defendants' alleged negligence under Minnesota common law. Thus, plaintiffs' "well pleaded" complaint, on its face, includes only state law claims. This Court must therefore remand this case to state court unless it can find that the FRSA or ICCTA completely preempts plaintiffs' state law claims.

Defendants claim that plaintiffs' state law claims for negligence are completely preempted by Congress' enactment of the FRSA and the ICCTA, because the statutes so pervasively regulate railroad matters, especially rail safety. . . ." *See* Canadian Pacific Railway's Opposition to Motion to Remand ("Defs.' Memo.") at p. 7. Plaintiffs, on the other hand, argue that neither the FRSA nor the ICCTA completely preempt their action because the statutes do not provide them with a cause of action that replaces their common law negligence claim for personal injuries. *See* Plaintiffs' Memorandum of Law in Support of its Motion to Remand, at p. 9. Defendants cite to *Avco Corp. v. Aero Lodge No. 735, Intern. Ass'n of Machinists and Aerospace Workers*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), *Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987), in an attempt to counter plaintiffs' assertion that a replacement cause of action is required for complete preemption. In order to address the positions of both plaintiff and defendant, it is necessary to review not only *Avco*, *Franchise Tax Board and Metropolitan Life*, but also the Supreme Court's decisions in *Caterpillar and Beneficial National Bank*.

In *Avco*, the plaintiff filed a suit in Tennessee state court to enjoin its union employees from striking at its plant. 390 U.S. at 558, 88 S.Ct. at 1236. The focus of the complaint was a "no-strike" clause in the collective bargaining agreement,

pursuant to which "grievances" between plaintiff and its union employees were to be settled amicably or by binding arbitration. *Id.* The union removed the case to federal court, citing § 301[1] of the Labor Management Relations Act (the "LMRA") as the basis of federal court jurisdiction. *Id.* at 558-59. 1236-37. The plaintiff subsequently moved to remand the case to state court. *Id.* at 558-59, 1236. The Court found that remand to state court was not appropriate, explaining as follows:

> The starting point is § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185, which, we held in *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972, was fashioned by Congress to place sanctions behind agreements to arbitrate grievance disputes. We stated: 'We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. * * * The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. . . . Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. * * * Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.'
>
> An action arising under § 301 is controlled by federal substantive law even though it is brought in state

[1] Section 301(a) provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a).

> court. . . . Removal is but one aspect of "the primacy of the federal judiciary in deciding questions of federal law. [Citations omitted.] It is thus clear that the claim under this collective bargaining agreement is one arising under the "laws of the United States" within the meaning of the removal statute. 28 U.S.C. § 1441(b). It likewise seems clear that this suit is within the "original jurisdiction" of the District Court within the meaning of 28 U.S.C. §§ 1441(a) and (b).

Id. at 559-60, 1237 (quoting *Textile*, 353 U.S., at 456-57, 77 S.Ct., at 917-18).

The *Avco* Court recognized that the "breadth or narrowness of the relief which may be granted under federal law . . . is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Id.* at 561, 1238. As such, it did not matter to the Court that federal courts were not able to provide injunctive relief in that case. However, the *Avco* Court did recognize that § 301 provided some form of relief to the plaintiff in the form of "specific performance of the promise to arbitrate, to enforcement or annulment of an arbitration award, to an award of compensatory damages." *Id.* (citations omitted).

In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), the principle question in dispute was whether the Employment Retirement income Security Act ("ERISA"), permitted state tax authorities to collect unpaid state income taxes by levying on funds that were held in trust for the defendants under an ERISA-covered vacation benefit plan. *Id.* at 4, 2843. The Franchise Tax Board commenced a suit in state court against the defendants seeking damages for defendants' failure to honor the levies and for a declaration that defendants were legally obligated to honor all future levies of the Board. *Id.* at 7, 2845. The defendants removed the case to federal court, and the Franchise Tax Board sought to remand the case back

to state court. The defendants argued that the decision in *Avco* should be applied to ERISA so as to completely preempt the taxing authority's state suit for monetary and declaratory relief. *Id.* at 22-26, 2853-2855. The United States Supreme Court rejected the defendants' argument finding that ERISA did not completely preempt the Board's suit and remanded the case back to state court. In reaching its conclusion, the Supreme Court stated that *Avco* "stands for the proposition that if *a federal cause of action* completely preempts *a state cause of action* any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Id.* at 23-24, 2854 (emphasis added). The Court stated the necessary ground for complete preemption in *Avco* was that "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization' . . . [such that] [a]ny such suit is purely a creature of federal law. . . ." *Id.* at 23, 2853-54. The Court then found that the Board's action for damages was not completely preempted under ERISA, the Board part, because § 502(a) taken in conjunction with § 502(e)(1),[2] did not provide it with an alternative cause of action to replace the state claim, ("ERISA does not provide an alternative cause of action in favor of the State to enforce its rights, while § 301 expressly supplied the plaintiff in *Avco* with a federal cause of action to replace its preempted state contract claim"), and in part, based on the legislative history of ERISA. Id. at 24-27, 2854-55.

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[2] Section 502(a) describes who is entitled to bring a civil action under ERISA: plan participants, beneficiaries, fiduciaries, the Secretary of Labor, and a state. Section 502(e)(1) states that "[except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, for] fiduciary . . ."

Similarly, in connection with the Board's claim for declaratory relief, the Court stated:

> ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief by some other party does not "arise under" that provision.

Id. at 27, 2855.

In *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed2d 55 (1987), a former employee sued his former employer and its insurer in state court alleging claims of breach of contract, retaliatory discharge and wrongful termination of disability benefits. The employer and insurer removed the case to federal court alleging federal question jurisdiction over the disability benefits claim by virtue of ERISA and pendent jurisdiction over the remaining claims. *Id.* at 61, 1545. The Supreme Court found that the employee's state law contract and tort claims were completely preempted by ERISA, and his suit to recover benefits from a covered plan, fell directly under § 502(a)(1)(B) of ERISA,[3] which provided an exclusive federal cause of action for resolution of such disputes. *Id.* at 63, 1546 (citation omitted). In reaching its decision, the Supreme Court stated that "the touchstone of the federal court's removal jurisdiction is . . . the intent of Congress." *Id.* at 66, 1548. It then identified the relevant intent as one "to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court." *Id.* In search of such

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[3] § 502(a)(1)(B) of ERISA provides: A civil action may be brought—

(1) by a participant or beneficiary—

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan

intent, the *Metropolitan Life* Court noted ERISA's uniquely expansive express preemption clause:

> "'The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.'".

Id. at 65, 1547 (quoting 29 U.S.C. § 1132(f)).

In ascertaining the intent of Congress, the Court also looked to the legislative history of ERISA, and found that this history set out a clear intention to make § 502(a)(1)(B) suits brought by participants or beneficiaries federal questions for the purpose of federal jurisdiction in like manner of § 301 of the LMRA. *Id.* at 66, 1547-1548. In this regard, the Court stated:

> Senator Williams, a sponsor of ERISA, emphasized that the civil enforcement section would enable participants and beneficiaries to bring suit to recover benefits denied contrary to the terms of the plan and that when they did so '[i]t is intended that such actions will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act.'

Id. at 66, 1547-48 (quoting 120 Gong. Rec. 29933 (1974)) (citation omitted).

In *Caterpillar*, decided shortly after *Metropolitan Life*, the Supreme Court was again confronted with the issue relating to the preemptive effect of the LMRA. In *Caterpillar*, the dispute arose out of state law breach of employment contract claims involving contracts with individual employees and not their collective bargaining agreement 482 U.S. at 394-95, 107 S.Ct at 2431. Caterpillar removed the case to federal court on grounds that any individual employment contracts were merged into and superceded by the collective bargaining

agreement of the parties, and therefore, were governed by federal substantive law. *Id.* at 390, 2428. Citing to *Metropolitan Life and Franchise Tax Board*, the Supreme Court stated:

> On occasion, the Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.

Id. at 393, 2430.

The Supreme Court then concluded that § 301 of the LMRA did not preempt the plaintiffs' individual breach of contract claims, stating, "[S]ection 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement. . . . Section 301 says nothing about the content or validity of individual employment contracts. *Id.* at 394, 2431 (citations omitted). Further, the Court stated:

> [N]ot every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of federal labor law. Claims bearing no relationship to a collective bargaining agreement beyond the fact that they are asserted by an individual covered by such a agreement are simply not pre-empted by § 301. *See also Franchise Tax Board*, 463 U.S. at 25, n. 28, 103 S.Ct. at 2854, n. 28 ('[E]ven under § 301 we have never intimated that any action merely relating to a contract within the coverage of § 301 arises exclusively under that section. For instance, a state battery suit growing out

> of a violent strike would not arise under § 301 simply because the strike may have been a violation of an employer-union contract.')

Id. at 397, 2432 n. 10 (citation omitted).

Finally, in *Beneficial Nat. Bank v. Anderson*, __ U.S. __, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003), the Supreme Court was presented with the issue of whether state "usury violations" alleged in the complaint were completely preempted by the National Bank Act. *Id.* at 2061. In this case, taxpayers made pledges of their anticipated tax refunds to secure short-term loans obtained from Beneficial National Bank, a bank chartered under the National Bank Act. The taxpayers then brought a suit in state court alleging that the bank's interest rates were usurious. *Id.* The bank removed the case to federal court alleging that the National Bank Act preempted the suit.

The Supreme Court analyzed its previous decisions in *Avco, Franchise Tax Board,* and *Metropolitan Life.* With respect to *Metropolitan Life*, it held that removal based on ERISA was proper for two reasons:

> First, the statutory text in § 502(a), 29 U.S.C. § 1132, not only provided an express federal remedy for the plaintiffs' claims, but also in its jurisdiction subsection, § 502(f), used language similar to the statutory language construed in *Avco*, thereby indicating that the two statutes should be construed in the same way. 481 U.S., at 65, 107 S.Ct. 1542. Second, the legislative history of ERISA unambiguously described an intent to treat such actions as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.' *Id.*, at 65-66, 107 S.Ct. 1542 (internal quotation marks and emphasis omitted).
>
> Thus, a state claim may be removed to federal court in only two circumstances--when Congress expressly so

> provides, such as in the Price-Anderson Act, supra, at 2062, or when a federal statute wholly displaces the state-law cause of action through complete pre-emption. When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. In the two categories of cases where this Court has found complete pre-emption—certain causes of action under the LMRA and ERISA—the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action. See 29 U.S.C. § 1132 (setting forth procedures and remedies for civil claims under ERISA); § 185 (describing procedures and remedies for suits under the LMRA).

Id. at 2062-2063.

The Court then stated that the dispositive question in the case before it was this. "Does the National Bank Act provide the exclusive cause of action for usury claims against national banks? If so, then the cause of action necessarily arises under federal law and the case is removable. If not, then the complaint does not arise under federal law and is not removable." *Id.* at 2063. The Supreme Court concluded that the National Bank Act did preempt the taxpayers' suit based on the provisions of the Act[4] and the intention of Congress to provide the exclusive cause of action for usury claims against national banks. *Id.* at 2064.

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[4] The Court found that § 85 of the Act explicitly set forth the substantive limits on the rates of interest national banks could charge, and § 86 of the Act set forth the elements of a usury claim, the statute of limitations for such a claim, the remedies available to borrowers who are charged higher rates, and the procedures governing such a claim. *Id.* at 2063.

Taken together, *Avco, Franchise Tax Board, Metropolitan Life, Caterpillar* and *Beneficial National Bank* stand for this: "Whether federal law preempts a state-law cause of action is a question of congressional intent" *Gore*, 210 F.3d at 949 (citation omitted); *see also Agre v. Rain & Hail LLC*, 196 F. Supp.2d 905, 911 (D. Minn. 2002) (citing *Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998)) (the complete preemption doctrine applies only where Congress has clearly manifested an intent to disallow state law claims in a particular field); *Blaylock*, 104 F. Supp.2d at 1187 ("The jurisdictional question concerning 'complete preemption' centers on whether it was the intent of Congress to make the cause of action a federal cause of action and removable despite the fact that the plaintiff's complaint identifies only state claims.") (quoting *Whitman v Raley's Inc.*, 886 F. 2d 1177, 1181 (9th Cir. 1989)). Such Congressional intent has only been found by the Supreme Court in those cases where (1) the federal statute at issue contains some sort of remedial framework for the plaintiffs claim; (2) the plaintiff was eligible to bring a claim under that remedial framework; and (3) Congress has evinced its intent to provide the exclusive cause of action for that claim. However, these cases do not stand for the proposition that the federal law must provide a superseding remedy to replace the state cause of action. To the contrary, such a premise was explicitly rejected by the Supreme Court in Caterpillar where the Court stated:

> The nature of the relief available after jurisdiction attaches, is of course, different from the question of whether there is jurisdiction to adjudicate the controversy. The breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter.

Caterpillar Inc., 482 U.S. at 391, 107 S.Ct. at 2429 (quoting *Avco*, 390 U.S. at 561, 38 S.Ct. at 1237-38).

With this framework in mind, this Court must determine whether Congress intended the FRSA or ICCTA to provide the exclusive civil remedy for plaintiffs' negligence personal injury claims.

II. Federal Railroad Safety Act

Defendants allege plaintiffs' claims are completely preempted because the FRSA and regulations arising out of the FRSA address the subject matter of plaintiffs' claims. *See* Defs.' Memo. at p. 13. The FRSA was passed in 1970 "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress also created the FRSA to ensure that railroad safety would be "'nationally uniform to the extent practicable. *Peters v. Union Pacific R. Co.*, 80 F.3d 257, 261 (8th Cir. 1996) (quoting 45 U.S.C. § 434). The FRSA delegates to the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." 49 U.S.C. § 20103(a).

Defendants point to 49 U.S.C. § 20106 to demonstrate the preemptive force of the FRSA. This provision states:

> Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106.

While it is true that the FRSA and its accompanying regulations, provide extensive control over railroad safety, the fact Congress has established an ordered regulatory scheme does not mean that it intended to preempt all state law claims within a particular field. *See Acre*, 196 F. Supp.2d at 911 (citation omitted); *Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir. 2001) (finding that FCC regulations standardizing certain aspects of telephone industry insufficient to create complete preemption); *Virgil v. Reorganized M.W. Co., Inc.*, 156 F. Supp.2d 624, 631 (S.D. Miss. 2001) ("Not even Congressional intent to impose a uniform legal standard will necessarily imply its intent to establish complete preemption and hence federal removal jurisdiction.")).

Defendants cite to *Peters v. Union Pacific R. Co.*, 80 F.3d 257 (8th Cir. 1996) and *Rayner v. Smirl*, 873 F.2d 60 (4th Cir. 1989) for the proposition that complete preemption applies to the FRSA.[5] *See* Defs.' Memo. at pp. 11-12. In *Peters*, the

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[5] Defendants have cited to several other cases which they acknowledge arise out of the defensive preemption doctrine, as opposed to the complete preemption context. Nonetheless, defendants claim these cases have bearing on whether the FRSA and its regulations dealing with railway safety are so powerful as to displace entirely any state cause of action. *See* Defs.' Memo. at p. 8 n. 2: *see e.g.*, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 675 113 S.Ct. 1732, 1743, 123 L.Ed.2d 387 (1993) (finding that that the FRSA regulations on speed limits for trains preempted plaintiff's state negligence claim that the conductor was going too fast.). This Court reaches no decision as to defensive preemption under either the FRSA or the ICCTA as that issue is not before this Court. The "jurisdictional issue of whether 'complete preemption' exists is very different from the substantive inquiry of whether a 'preemption defense' may be established." *Blaylock*, 104 F. Supp.2d at 1187 (citation omitted). "A case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiffs complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc.*, 482 U.S. at 393, 107 S.Ct. at 2430 (emphasis in original) (citation omitted). Moreover, the exclusivity of a statute together with its broad scope, without a federal cause of action that the plaintiff could have plead, is not enough under the

railroad company issued the plaintiff a locomotive engineer certificate, under the the FRSA, which permitted him to operate a locomotive. 80 F.3d at 259 (citation omitted). The railroad company suspended the plaintiffs certificate for violating several locomotive operating regulations. *Id.* The plaintiff filed an action in state court alleging that the railroad company had converted his certificate because it had not returned it after the one-month suspension. *Id.* at 260. The court in Peters noted that pursuant to the FRSA, the Secretary of Transportation had issued preemptive regulations concerning engineer certification including:

> [A] specific, detailed scheme setting out dispute resolution procedures. See 49 C.F.R. §§ 240.401-240.411 (1993). The regulations establish a review board to consider petitions challenging a railroad's denial of certification or recertification, or revocation of certification. 49 C.F.R. § 240.401(a), Any person denied certification can petition the Locomotive Engineer Review Board (Board) to determine whether the denial was improper. 49 C.F.R. § 240.401(a) (1993). Any party adversely affected by the Board's decision has a right of appeal. 49 C.F.R. § 240.411 (1993).

Id. at 261. The Eighth Circuit found that the comprehensive remedial scheme provided by these regulations served to confirm the FRSA's preemptive scope with regards to issues relating to the certification of locomotive engineers. *Id.* (citing *Rayner*, 873 F.2d at 65).

In *Rayner*, the plaintiff alleged that he observed several safety violations and reported them to his superiors. 873 F.2d

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Supreme Court's decisions in *Avco*, *Franchise Tax Board*, *Metropolitan Life*, *Caterpillar* and *Beneficial National Bank* to create complete preemption. *See Aaron v. National Union Fire Ins. Co. of Pittsburgh, Pa*, 876 F.2d 1157, 1165-66 (5th Cir. 1989), *cert. denied*, 493 U.S. 1074, 110 S.Ct. 1121, 107 L.Ed.2d 1028 (1990).

at 62. The plaintiff was subsequently removed from his position as a road foreman and reassigned as a locomotive engineer. Id. The plaintiff alleged that the railroad removed and reassigned him in retaliation for safety complaints he made regarding the operation of the railroad. *Id.* The plaintiff filed suit in state court asserting a wrongful discharge action under Maryland law. Defendants removed the action to federal district court, claiming that the plaintiffs state claim for wrongful discharge was preempted by the FRSA. *Id.* at 62-63. The court disagreed with the plaintiff's assertion that the FRSA had no preemptive effect on his claims because it lacked a remedy, since the amendments to the FRSA in 1980 afforded explicit protection to whistleblowers. *Id.* at 63 (citing 45 U.S.C. § 441(a)). The court in *Rayner*, like the Eighth Circuit in *Peters*, found that "comprehensive remedial scheme for aggrieved railroad employees provided in § 441 serves to confirm its preemptive scope"—

> The parties may petition for a hearing before the National Railroad Adjustment Board and may be represented by counsel. An employee who prevails before the Board may seek enforcement of the Board's order in the federal district courts, and either party may petition the federal district courts for review of the Board's decisions. *See* generally 45 U.S.C. § 153. The specific remedies for wrongfully discharged workers are also set forth. The Board may award backpay to aggrieved railroad employees and may order employers to reinstate discharged or demoted employees to their previous positions. *See* 45 U.S.C. § 441(c)(2).

Rayner, 873 F.2d at 65. The court found that Congress intended the federal remedy in § 441 to supersede state law in dealing with "whistleblowers" because the "specific remedial scheme illustrates a congressional intent that the FRSA remedy for railroad 'whistleblowers' be exclusive." *Id.* (citation omitted).

The difference between the present case and Peters and Rayner is that the FRSA and its regulations explicitly provided remedial schemes for the injuries alleged by the plaintiffs in *Peters* and *Rayner*, whereas in this case, the FRSA and its supporting regulations do not have in place any remedial framework to redress the plaintiff's personal injuries.[6] "To determine whether state-law claims fall within the scope of the provision, a court must first discern whether the plaintiff is eligible to bring a claim under the section." *Blaylock*, 104 F. Supp. 2d at 1188 (citation omitted). *See also State of Minn. by Ulland v. International Ass'n of Entrepreneurs of America*, 858 F. Supp. 937, 942 n. 9 (D. Minn. 1994) (citing Franchise Tax. Bd., 463 U.S. at 26, 103 S.Ct. at 2855) ([It is] "important for the purposes of complete preemption to determine whether [federal law] provides an alternative cause of action for any state laws claims it might preempt."); *Johnson v. Baylor Univ.*, 214 F.3d 630, 632 (5th Cir.) *cert. denied*, 531 U.S. 1012, 121 S.Ct. 567, 148 L.Ed.2d 486 (2000) (finding that to establish complete preemption, the party claiming preemption must show that "the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law . . . ") (citing *Heimann v. Nat'l Elevator Ind. Pension Fund,* 187 F.3d 493, 501 (5th Cir. 1999)); *Kelley v. Norfolk & Southern Railway Co.*, 80 F. Supp.2d 587, 590 n. 3 (S.D.W.V. 1999) (citation omitted) ("If the Court finds that [the FRSA] does in fact provide Kelley a remedy, the Court has no doubt that Kelley's claims for intentional infliction of emotional distress would be preempted.").

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[6] In fact, defendants are not claiming that plaintiffs would have a FRSA-created cause of action for the facts they allege. *See Hurt v. Dow Chemical Co.*, 963 F.2d 1142, 1144 (8th Cir. 1992) (finding that the Federal Insecticide, Fungicide, and Rodenticide Act ("FLFRA") did not completely preempt state claims as it did not create a cause of action for the facts pled by the plaintiff and "no one claims that plaintiff would have a FLFRA-created cause of action for the facts she alleges.")

Moreover, this Court can find no suggestion in the legislative history of the FRSA that Congress intended to create a cause of action on behalf of third parties injured by a railroad's violation of the safety rules and regulations promulgated by the Secretary of Transportation pursuant to the FSRA. *See* H.R. Rep. 91-1194, U.S. Code Cong. & Admin. News 1970. To the contrary, while the legislative history of the FRSA is permeated with references to railroad safety, descriptions of horrific injuries caused by railroad accidents (including derailments resulting in the spillage or explosions of hazardous materials), and the need for national and uniform regulations to prevent such accidents (*see e.g.*, H.R. Rep. 91-1194, U.S. Code Cong. & Admin. News 1970, pp. 4105-4108), it is clear that the focus of the FRSA is on the regulation and control of railroads for the purpose of preventing future accidents, and not on the provision of a mechanism or a remedy to redress those persons who are the victims of an accident. Consequently, to the extent that the legislative history of the FRSA discusses the enforcement of and remedies for violation of the Act, it is limited to the Secretary of Transportation's or individual state's authority to seek compliance with the Secretary's regulations through the assessment of penalties or requests for injunctive relief against any railroad which violates. *See* H.R. Rep. 91-1194, U.S. Code Cong. & Admin. News 1970, pp. 4109-4111, 4112-4113, 4118-4121.

Therefore, based on the language of the FRSA and the legislative history leading up to its enactment, this Court does not find that Congress intended for the FRSA to provide the exclusive cause of action for plaintiffs' claims. Since the FRSA does not completely preempt plaintiffs' claims, it cannot form the basis of removal of this case to federal court.[7]

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[7] Defendants' arguments that 49 U.S.C. §§ 21301-21303 provide an enforcement mechanism to persons injured as a result of an accident involving a railroad are without merit. Sections 21301-21303 only provide

III. Interstate Commerce Commission Termination Act

Defendants claim that based on the express language of the ICCTA, this Act completely preempts plaintiffs' state negligence claims for personal injury and emotional distress resulting from the train derailment. It is true that the ICCTA provides that its purpose, in part, is to promote safe rail transportation. *See* 49 U.S.C. § 10101(3), (8)).[8] In addition, under § 1121(a)(1) of the ICCTA, the Surface Transportation Board ("STB"), to whom the regulation of a railroad's operations have been delegated pursuant to the ICCTA, "may require a rail carrier to provide facilities and equipment that are reasonably necessary to furnish safe and adequate car service if the Board decides that the rail carrier has materially failed to furnish that service." 49 U.S.C. § 1121(a)(1).

Further, 49 U.S.C. § 11704 (a) and (b) state:

> (a) A person injured because a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part does not obey an order of the Board, except an order for the payment of money, may

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that violations of the FRSA will result in civil penalties payable to the United State Government. It provides no civil enforcement mechanisms to those injured as a result of a violation of the FRSA or its supporting regulations.

[8] 49 U.S.C. § 10101 provides in relevant part:

> In regulating the railroad industry, it is the policy of the United States Government—
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> * * *
>
> (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;
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> * * *
>
> (8) to operate transportation facilities and equipment without detriment to the public health and safety . . . .

bring a civil action in a United States District Court to enforce that order under this subsection.

(b) A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part. A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable to a person for amounts charged that exceed the applicable rate for the transportation.

49 U.S.C. § 11 704 (a)-(b).

Finally, under the ICCTA, the jurisdiction of the STB, pursuant to 49 U.S.C. § 10501(b), extends over:

(1) [T]ransportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.[9]

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[9] With regards to the express preemption clause contained in 49 U.S.C. § 10501(b)(2), courts have found that "'[i]t is difficult to imagine a broader statement of Congress' preemption intent to preempt state regulatory authority over railroad operations.'" *See Soo Line Railroad Co. v. City of Minneapolis*, 38 F. Supp.2d 1096, 1099 (D. Minn. 1998) (finding that summary judgment in favor of the defendant was appropriate because the ICCTA expressly preempts a city's authority to withhold demolition permits) (quoting *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944

49 U.S.C. § 10501(b) (emphasis added).

This Court agrees that some state law claims are completely preempted by the ICCTA, in part based on these various provisions of the Act, and in part, based on the legislative history of the statute. In this regard, the House Committee Report on the ICCTA provides:

> This provision [referring to the express preemption clause] is conformed to the bills' direct and general preemption of State jurisdiction over economic regulation of railroads. As used in the this section 'State of Federal law' is intended to encompass all statutory, common law, and administrative remedies addressing the rail-related subject matter jurisdiction of the Transportation Adjudication Panel.

H.R. Rep. 104-311 (1995) (emphasis added).

Nevertheless, while the ICCTA does refer to safety under § 10101(3) and (8), contains an explicit preemption provision for those remedies covered by the Act, 49 U.S.C. § 10501(b)(2), and includes an explicit enforcement provision for certain types of claims, 49 U.S.C. § 11704 (a) and (b), this Court finds that there is no complete preemption in this case because none of plaintiffs' claims are covered by the remedial or enforcement mechanisms provided by the Act. The ICCTA does not contain civil enforcement procedure for plaintiffs

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F. Supp. 1573, 1581 (N.D. Ga. 1996)); *see also Columbiana County Port Authority v. Boardman Township Park District*, 154 F. Supp.2d 1165, 1180 (N.D. Ohio 2001) ("The courts that have considered the preemption issue following ICCTA's enactment have consistently found that the foregoing preemption clause is both clear and broad . . . It is clear that the ICCTA has preempted all state efforts to regulate rail transportation.") (citations omitted); *Guckenberg v. Wisconsin Central Ltd.*, 178 F. Supp.2d 954, 958 (E.D. Wis. 2001) ("Indeed, the language is 'clear and broad,' and it is apparent that the "ICCTA has preempted all state efforts to regulate rail transportation.") (quotation omitted).

similar to section 502 of ERISA, 29 USCA § 1132, or section 301 of the LMRA, 9 U.S.C.A. § 185(a). *See City of Laredo v. Texas Mexican Ry. Co.*, 935 F. Supp. 895, 898 (S.D. Tex. 1996). Rather, "[u]nder the statute, a person may file suit in federal court only to enforce an order of the Board, to recover overcharges or to recover under a bill of lading." *Id.* (citing 49 U.S.C. §§ 11704(a); 11705(a), (e): and 11708(d)); *see also DeBruce Grain. Inc. v. Union Pacific R, Co.*, 983 F. Supp 1280, 1284 (W.D. Mo. 1997), *affd*, 149 F.3d 787 (8th Cir. 1998) ("[T]here is no provision governing the filing of a civil action for damages other than with respect to the right to recoup charges or to enforce the board's orders."). As such, there is nothing in the ICCTA that permits a person to file a suit in federal court to recover damages for personal injury resulting from the action of a railroad governed by the ICCTA.

Consequently, defendants reliance on *Deford v. Soo Line R. Co.*, 867 F.2d 1080 (8th Cir. 1989) and *Grantwood Village v. Missouri Pacific R. Co.*, 95 F.3d 654 (8th Cir. 1996), and *South Dakota ex rel. South Dakota R.R. Authority v. Burlington Northern & Santa Fe Ry. Co.*, 280 F. Supp.2d 919 (D.S.D. 2003), for the proposition that the ICCTA completely preempts plaintiffs' negligence claims, is misplaced.

In *Deford*, the defendant agreed to sell a portion of its rail lines. 867 F.2d at 1082. To comply with the Interstate Commerce Act ("ICA"), the predecessor to the ICCTA, the defendants were required either to obtain approval for the sale by the Interstate Commerce Commission ("ICC"), the predecessor to the STB, or receive an exemption. *Id.* The exemption was granted over the objections of labor organizations. *Id.* Subsequently, railroad employees adversely affected by the sale of a portion of a railroad brought an action against their railroad employer claiming common law creditors' rights violations and violation of the Minnesota Uniform Fraudulent Transfer Act. *Id.* at 1082-83. The Eighth Circuit found that

both state claims were completely preempted by the ICA. In so finding, the court noted that the ICA required the railroad to obtain permission from the ICC, which could place labor protective agreements on the railroad, before it acquired or obtained a railway line. *Id.* at 1088 (citation omitted). The Eighth Circuit also noted that ICC provided a forum for the plaintiffs' complaints and possible relief. *Id.* at 1090.

Grantwood, involved an abandonment under the ICA, in which one party filed a request for interim use during abandonment proceedings before the ICC. 95 F.3d at 656. The ICC granted a notice of interim use and the parties reached an agreement regarding trail use within the time provided by the ICC. Id. A subsequent quiet title action raised the question of whether the trail use agreement precluded abandonment and reversion to the owners of the underlying property. The Eighth Circuit held that removal of the case from state court was proper given that the suit amounted to a collateral attack on the ICC's allowance for interim trail use and that the ICC's authorization of such trail use precluded a finding that the right of way had been abandoned under state law. *Id.* at 657.

In *South Dakota ex rel. South Dakota R.R. Authority*, the State of South Dakota, by and through the South Dakota Railroad Authority ("SDRA"), filed suit for specific performance and injunctive relief arising out a contract, which allowed the SDRA and its designees to utilize a portion of the defendant's interchange access line. *Id.* at 923. In addition, the complaint sought damages for breach of contract and tortious interference with a business relationship. *Id.* The court found that the plaintiffs were seeking "state contract and tort remedies arising out of contracts which were previously approved by the ICC and the STB pursuant to federal law." *Id.* at 929. In finding complete preemption, the court noted that the ICCTA authorized the STB to regulate the contracts at

issue and that contracts arose out of federal law and policy. *Id.* at 932.[10]

These three cases demonstrate that in some instances complete preemption of state actions is proper under the ICCTA. In Deford, complete preemption from employee claims was proper as the railroad had complied with the ICA and obtained an exemption from regulation relating to its sale of a rail line. In Grantwood, removal was proper because the state action amounted to a collateral attack on the ICC's authorization of trait use precluded a finding that the right of way had been abandoned under state law in South Dakota ex rel.

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[10] Defendants also cite to several cases dealing with defensive preemption, which they claim allegedly show that negligence actions are preempted by the ICCTA. In *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439 (5th Cir. 2001), the plaintiffs, who operated a nursery, brought a negligence action against the railroad claiming a loss in business because their customers were required to wait for long periods in getting to their nursery when the primary access road was blocked by waiting trains. *Id.* at 441. The plaintiffs had brought common law state claims of negligence and negligence per se for the defendant's violation of Texas' Anti-Blocking Statue. *Id.* at 441-42. In finding preemption, the court emphasized the goal of uniformity in railroad operations and that it was Congress' apparent intent that the ICCTA further that goal at (east as to the economic realm. *Id.* at 443-44. *See also Guckenberq*, 178 F. Supp.2d at 956 (finding common law nuisance claims brought by plaintiff, regarding the construction of tracks by their home, preempted under the ICCTA since the STB has exclusive jurisdiction, and provided the exclusive remedies, regarding the construction and operation of side tracks); *City of Auburn v. United States Government*, 154 F.3d 1025, 1027-28 (9th Cir. 1998) (finding that the local environmental review for a rail line acquisition was preempted by the ICCTA because 10501(b) gave the STB exclusive jurisdiction authority over the acquisition of rail tracks). Although these cases make it clear that economic regulations as to the acquisition, construction, and operation of rail tracks are within the purview of the STB, they do not provide any guidance as to whether the issue of rail safety falls under the jurisdiction of the STB. *See e.g., Friberg*, 267 F.3d at 444 (noting that the court was not ruling on whether the ICCTA precludes state regulation of safety).

removal was appropriate because it pertained to complete preemption over contracts approved and regulated by the STB. Nevertheless, all three cases are distinguishable from the present case in that there has been no assertion by the defendants that plaintiffs are using their lawsuit to usurp previous actions of the STB pertaining to them. Moreover, none of these decisions address the issue before this Court. Whether the ICCTA completely preempts personal injury claims premised on state common-law negligence claims.

Further, the legislative history of the ICCTA and the STB support plaintiffs' contention that the ICCTA does not preempt plaintiffs' state negligence claims for personal injury and emotional distress resulting from the train derailment.

In 1887, Congress enacted legislation to regulate commerce, which crated the Interstate Commerce Commission ("ICC"). See S. Rep. 104-176, 1995 WL 701522 at *2 (1995). The ICC was initially created "to protect shippers from the monopoly power of the railroad industry." *Id.* The ICC's regulatory authority over railroad companies was subsequently expanded. *Id.* By the 1960's, the ICC's regulatory structure was considered burdensome and restrictive and the federal government created new agencies to deal with emerging transportation problems. *Id.* at *3. "In 1967, the DOT was created and virtually all of the ICC's safety oversight functions were transferred to the new agency. However, economic regulation remained at the ICC." *Id.*

By 1970, despite the ICC's continued broad regulatory powers, the country's railroads were falling into bankruptcy. Id. In 1977, noting the ineffectiveness of the ICC, President Jimmy Carter created a task force that was charged with streamlining the ICC and deregulation. *Id.* As a result, Congress enacted the Railroad Revitalization and Regulatory Reform ("4R") Act of 1976, which provided increased flexibility for rail carriers to raise or lower rates to conform to market forces. *Id.* In 1980, Congress enacted the Staggers

Rail Act, providing the rail industry with many of the same market freedoms available to other competitive industries including removing antitrust immunity over collective rate-making, reducing rail rate regulation, and easing the way for mergers. *Id.* The ICCTA, enacted in 1995, eliminated the ICC and transferred its duties to the STB". Id. at *5. The ICCTA was not an attempt to substantively change rail regulation. *Id.* at *6. Instead, the ICCTA was meant to "preserve the careful balance put in place by the 4R Act and the Staggers Act that led to a dramatic revitalization of the rail industry while protecting significant shipper and national interests." *Id.* The ICCTA was meant to retain those provisions needed to preserve an efficient national rail network comprised of numerous individual carriers including:

> Federal regulatory oversight of line constructions, line abandonments, line sales, leases, and trackage rights, mergers and other consolidations (under a broad public interest standard and with ongoing regulatory oversight), car supply and interchange, antitrust immunity for certain collective activities (including pooling of equipment and services), competitive access, financial assistance, feeder line development, emergency service orders, and recordation of equipment liens.

Id. at *6-7. In addition, the ICCTA was to maintain provisions that are necessary to protect rail shippers. *Id.* at *7. "These include the common carrier obligation, regulatory oversight of the reasonableness of rail practices, maximum rate regulation for captive traffic, advance notice of rate increases, and rate tariffs for agricultural commodities and fertilizer." *Id.*

There is no mention in the legislative history that the purpose of the ICCTA was to provide oversight for the safety of rail lines. To the contrary, the Senate Report's impact statement provides that:

> A wide variety of businesses and consumers would be covered and potentially impacted by this bill. They include rail carriers, certain pipeline carriers (those transporting commodities other than oil, gas, or water), trucking companies, intercity bus companies, water carriers, freight forwarders, and transportation brokers, and their various customers. Government employees who work for the ICC and FMC would also be affected by this bill.

Id. at *17.

The Report contains no language to suggest that residents in areas surrounding rail lines who sustain personal injuries from a railroad's unsafe operation of its trains, would be affected by this legislation. In sum, the legislative history of the ICCTA supports the position that the focus of the ICCTA and the STB is on economic regulation of rail transportation and not the regulation of railway safety. "Although states retain the police powers reserved by the Constitution, the Federal scheme of *economic regulation and deregulation* is intended to address and encompass all such regulation and to be completely exclusive." H.R. Rep. No. 104-311.

Moreover, a finding by this Court that the ICCTA and the STB has exclusive jurisdiction over the safety of the railways would run contrary to the FRSA. Congress enacted the Federal Railroad Safety Act in 1970 "to promote safety in all areas of railroad operations." 45 U.S.C. § 421. In order to achieve this goal, "the Act authorized the Secretary of Transportation to 'prescribe, as necessary, appropriate rules, regulations, orders and standard for all areas railroad safety.'" *Burlington Northern Railroad Co. v. State of Minnesota*, 882 F.2d 1349, 1351 n. 5 (8th Cir. 1989) (quoting 45 U.S.C. § 431). The Secretary of Transportation has delegated this authority to the Federal Railroad Administrator ("FRA"). *Id.* (citing 49 C.F.R. § 1.49(m) (1988)).[11] As such, a finding by

[11] 49 C.F.R. § 1.49 provides in relevant part:

this Court that the STB has the exclusive jurisdiction over train safety, would be in direct conflict with Congress' delegation to the Secretary of Transportation (and by the Secretary, to the FRA), the authority over railroad safety.

"A primary rule of statutory construction is that when a court interprets multiple statutes dealing with a related subject or object, the statutes are *in pari material* and must be considered together." *Linquist v. Bowen*, 813 F.2d 884, 888 (8th Cir. 1987) (citing *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-65, 11 L.Ed. 724 (1845)). A proper analysis "reads the parts of a statutory scheme together, bearing in mind the congressional intent underlying the whole scheme." *Id.* at 889 (citations omitted). "While the STB must adhere to federal policies encouraging 'safe and suitable working conditions in the railroad industry,' the 1CCTA and its legislative history contain no evidence that Congress intended for the STB to supplant the FRA's authority over rail safety." *Tyrrell v. Norfolk Southern Rv. Co.*, 248 F.3d 517. 523 (6th Cir. 2001) (citation omitted). Instead, the "agencies' complementary exercise of their statutory authority" demonstrates Congress intent for the ICCTA and the FRSA to be construed *in pari material*. *Id.* The STB and the FRA in their 1998 Safety Integration Plan rulemaking recognized that their joint responsibility for promoting rail safety, but at the same time found that "the FRA exercised primary authority over rail safety matters under 49 U.S.C. § 20101 *et seq.*, while the STB handled economic regulation and environmental impact assessment." *Tyrrell*, 248 F.3d at 523 (citing Regulations on Safety Integration Plans Governing Railroad Consolidations,

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The Federal Railroad Administrator is delegated authority to—

* * *

(m) Carry out the functions vested in the Secretary by the Federal Railroad Safety Act of 1970 (Title II of Pub.L. 91-458); 84 Stat. 971, 45 U.S.C. 421 *et. seq.*). . . .

Mergers, and Acquisitions of Control; and Procedures for Consideration of Safety Integration Plans in Cases Involving Railroad Consolidations, Mergers, and Acquisitions of Control, STB Ex Parte No. 574, FRA Docket No. SIP-1, Notice No. 1, 63 Fed. Reg. 72,225 (Dec. 31, 1998)).[12]

As stated previously, the ICCTA provides that its purpose, in part, is to promote safe rail transportation. 49 U.S.C. § 10101(3), (8). Section 10101 establishes "the basic policy directive against which all of the statutory provisions the Board administers must be evaluated." *See* Final Rule, STB Ex Parte No. 574, FRA Docket No. 1999-4985. This policy applies to every transaction under the STB's jurisdiction. *Id.* However, 49 U.S.C. § 10101 does not establish on its face that the STB has exclusive jurisdiction over safety; only that it must consider issues of safety in transactions under its jurisdiction. In sum:

> Based on the federal railway statutes, the STB and FRA's jurisdictional management, and the resulting regulatory systems, Congress 'vested the FRA with primary authority over national rail safety policy and assigned the STB the duty to encourage 'safe and suitable working conditions' for railway employees through its assessment of individual railway proposals subject to its authority.

Tyrrell, 248 F.3d at 523.

Finally, in determining the jurisdiction of the STB, it is also helpful to look at the agency's own understanding of its jurisdiction under the ICCTA. According to the STB, the

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[12] *See also* Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, and Acquisitions of Control; and Procedures for Consideration of Safety integration Plans in Cases Involving Railroad Consolidations, Mergers, and Acquisitions of Control, STB Ex Parte No. 574, FRA Docket No. 1999-4985, Notice No. 4 (Mar. 8, 2002) ("Final Rule, STB Ex Parte No. 574, FRA Docket No. 1999-4985").

functions it retained over rail regulation pursuant to 1995 enactment of the ICCTA are as follows:

> Common Carrier Obligation. Exemptions. Rail Mergers. Line Transfers, Leases, and Trackage Rights. Line Sales to Noncarriers. Labor Protection. Rate Regulation for Common Carriage, including: Public Disclosure of Rates and Service Terms. Advance Notice of Rate Increases or Changes in Service Terms. Maximum Rate Reasonableness for Captive Traffic. Contracts for Transportation of Agricultural Products requirements, including: Filing of Summaries. Protest and Matching Rights. Equipment Limitations. Rail Cost Adjustment Factor (RCAF) Computation. Reasonableness of Practices. Rate Discrimination Car Supply and Interchange. Emergency Service Orders. Competitive Access. Line Constructions, including Line Crossings. Line Abandonments, including: Financial Assistance. Rails-to-Trails. Public Use Provision for Right-of-way. Feeder Line Development Program. Collective Ratemaking (and Antitrust immunity) InterLocking Officers and Directors Recording Liens. Data Collection and Oversight[]

See Surface Transportation Board,- Who's Who and What Does it Do?, *available at* http:/lwww.stb.dot.gov/Publications/whoswho.htm#Functions. Based on this list of retained functions, it cannot be gleaned that the STB believes it has retained jurisdiction over railway safety or accidents involving railroads. Moreover, according to the STB, "[i]n the performance of its functions, the Board is charged with promoting, where appropriate, substantive and procedural regulatory reform in the economic regulation of surface transportation, and with providing an efficient and effective forum for the resolution of disputes." *Id.* It is apparent that the STB believes that it is charged with economic, and not safety, regula-

tion of surface transportation.[13] Given the requirement that the ICCTA and the FRSA must be construed *in pari material*, the STB's perception of its own jurisdiction, and the legislative history of the ICCTA, this Court finds that rail safety does not fall under the primary jurisdiction of the STB.

For all of these reasons, a finding that the ICCTA completely preempt plaintiffs' personal injury negligence claims is not appropriate in this case.

IV. Plaintiffs' Request for Attorneys' Fees and Costs

Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Under the language of Section 1447(c), the Court has discretion to order the payment of costs and attorneys' fees. *See Moline*, 259 F.Supp.2d at 905. While this Court concludes, and recommends, that remand is necessary in this case, the question appears to be one of first impression in this Circuit, and presents a close question. Therefore, as an exercise of discretion, this Court recommends that plaintiffs' request for an award of attorneys' fees and costs be denied.

V. Conclusion

This Court finds that neither the FRSA nor the ICCTA completely preempt plaintiffs' personal injury negligence claims. The FRSA and its accompanying regulations, provide extensive control over railroad safety. However, defendants have not cited to, nor has this Court been able to find, any part of FRSA, or its accompanying regulations, that provide plaintiffs with a mechanism to redress the harms they have

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[13] The STB's interpretation of its jurisdiction of the ICCTA is supported by the legislative history surrounding the ICC, the predecessor to the STB. In 1967, the ICC had virtually all of its regulatory authority over railroad safety transferred to the Department of Transportation, while it retained jurisdiction over economic regulation.

allegedly suffered. In addition, there is nothing within the legislative history of the FRSA that demonstrates Congress' intent to completely preempt personal injury claims resulting from the actions of railroads.

As for the ICCTA, it, like the FRSA, does not contain a mechanism for the plaintiffs to address the harms they have sustained. The ICCTA's power lies with the authority of STB whose primary function pertains to the economic regulation and not the regulation of safety of railroads. Further, the legislative history of ICCTA undermines any assertion that plaintiffs' personal injury claims are preempted under this statute.

Since the FRSA and the ICCTA do not completely preempt plaintiffs claims, this case should be remanded to state court.

RECOMMENDATION

For the reasons set forth above, it is recommended that:

1. Plaintiffs' Motion to Remand [Docket No. 8] be GRANTED, and that matter be remanded to the Minnesota District Court, Fourth Judicial District; and

2. Plaintiffs' request for attorneys' fees and costs be DENIED.

Dated: January 29, 2004

/s/ JANIE S. MAYERON
Janie S. Mayeron
United States Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties on or before February 13, 2004 a copy of this Report, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection.

Unless the parties stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendations, the party making the objections shall timely order and file a complete transcript of the hearing on or before February 13, 2004.*

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* *See* S. Rep. 104-176, 1995 WL 701522 at *3.

APPENDIX C

[FILED 05 DEC 21]

STATE OF MINNESOTA COUNTY OF HENNEPIN	DISTRICT COURT FOURTH JUDICIAL DISTRICT CASE TYPE: Personal Injury
In re the Soo Line Railroad Company Derailment of January 18, 2002 in Minot, ND	Court File No. 04-007726

MEMORANDUM OF LAW
REGARDING CHOICE OF LAW

I. INTRODUCTION

Defendants from the January 18, 2002 derailment outside Minot, North Dakota have moved this Court for partial summary judgment on choice of law. This Court has issued an order granting Defendants' motion to apply the substantive laws of North Dakota to all actions arising out of the January 18, 2002 derailment outside of Minot, North Dakota. This Memorandum memorializes this Court's rationale for granting Defendants' motion.

II. APPEARANCES:

J. Gordon Rudd, Esq., Zimmerman Reed, P.L.L.P., 651 Nicollet Mall, Suite 501, Minneapolis, MN 55402, Mike Miller, Esq., Solberg, Stewart, Miller, Johnson, Tjon, Kennelly and O'Keeffe, LTD., 1129 5th Avenue South, P.O. Box 1897 Fargo, ND 58107, George G. Eck, Esq., Dorsey & Whitney LLP, 50 South Sixth Street, Suite 1500, Minneapolis, MN 55402, Kristy L. Albrecht, Esq., Benjamin Hasbrouck, Esq., Dorsey & Whitney LLP, 51 North Broadway, Suite 402, Fargo, ND 58102, Ronald J. Barczak,

Paula M. Jossart, Yaeger, JungBauer, Barczak & Vucinovich, 745 Kasota Av[illegible], Minneapolis, MN 55414, Daniel A. O'Fallon, Robin[illegible] Kaplan, Miller & Ciresi, L.L.P., 2800 LaSalle Plaza, 800 LaSalle Avenue South, Minneapolis, MN 55402-2015, Richard G. Hunegs, Steven M. Hunegs, Randal W. LeNeave, Hunegs, Stone, LeNeave, Kvas & Thornton, P.A., 1650 International Centre, 900 Second Avenue South, Minneapolis, MN 55402, and Gregory N. McEwen, McEwen Law Firm, Ltd., 1600 Pioneer Building, 336 N. Robert Street, Saint Paul, MN 55101, appeared on behalf of the moving plaintiffs (hereinafter, "Plaintiffs").

Timothy R. Thornton, Esq., Scott G. Knudson, Esq., Thomas J. Basting, Jr., Esq. and Kevin M. Decker, Esq., Briggs and Morgan, 2200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, appeared on behalf of Defendants Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited, Soo Line Railroad Company, Terry Kroll, and Michael Hanson (hereinafter, "Railroad Defendants").

III. FACTS AND PROCEDURAL POSTURE

A. The derailment.

These cases involve events that took place in the early morning hours of January 18, 2002, when a train owned by Canadian Pacific Railway, on its way from Edmonton, Alberta to St. Paul, Minnesota, derailed outside of the city of Minot, North Dakota.

> The derailment occurred at approximately 1:39 a.m., when a Canadian Pacific Railway freight train with 2 locomotives and 112 cars derailed 31 freight cars near Minot, North Dakota. Seven of 15 cars that were carrying anhydrous ammonia catastrophically failed, creating a vapor plume about 5 miles long, and 2 1/2 miles wide, which affected approximately 15,000 residents near the derailment site and a portion of the city of Minot.

NTSB Press Release, June 28, 2002.

The accident "resulted in one fatality, over 300 injuries and the displacement of residents for up to 30 days." Id. It is undisputed that the fatality mentioned in the preceding quote is John T. Grabinger.

B. The ensuing litigation.

Since January 18, 2002 almost two-hundred separate lawsuits have been filed by North Dakota residents claiming they were injured by the toxic cloud. In addition, there are two class-action cases currently pending. Approximately 160 of the individual cases were consolidated before the undersigned by Order of Judge Kevin Burke dated June 18, 2003. This Court has also been assigned one of the two class-action cases stemming from the derailment. This Court has stayed that class action. The other class action is pending in the Federal District Court of North Dakota.

Early in the litigation Plaintiffs indicated that they intended to move for leave to add a claim for punitive damages. This Court has, concurrent with this Court's decision herein, denied Plaintiffs' motion, regarding punitive damages, under both North Dakota and Minnesota law. It should be noted that there are significant substantive differences between North Dakota and Minnesota punitive damages law. For instance, North Dakota tort reform efforts have capped punitive damages awards at "two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater." N.D.C.C. § 32-03.2-11(4). Minnesota, on the other hand, has no such statutory cap. *See* Minn. Stat. § 549.20. A second difference is that the threshold a plaintiff has to meet in order to add a claim for punitive damages is higher under North Dakota law. In North Dakota, a plaintiff must prove by clear and convincing evidence that the defendant acted with oppression, fraud, or actual malice. *See* N.D.C.C. § 32-03.2-

11(1). In contrast, Minnesota law requires a plaintiff to prove by clear and convincing evidence that the defendant acted with deliberate disregard of the plaintiff's rights. Minn. Stat. § 549.20, subd. I.

The Railroad Defendants moved for summary judgment on the choice of law question. The Railroad Defendants argue that North Dakota's interest in this litigation overwhelm any interest Minnesota might have. In fact, the Railroad Defendants assert that Minnesota's policy against forum shopping overcomes any interest that Minnesota might have in applying its punitive damages law, and further that constitutional limitations on punishing out-of-state conduct precludes Minnesota from applying its punitive damages law to the out-of-state conduct that underlies this litigation.[1]

Plaintiffs argue that the law of the forum must apply because punitive damages are merely a remedy and thus not subject to a choice of law analysis. Plaintiffs further assert that Minnesota law should apply even under choice of law analysis because: (1) the Soo Line Railroad Company, one of the Railroad Defendants, was incorporated in Minnesota and has strong historic ties to Minnesota; (2) the corporate conduct giving rise to the motion to add a claim for punitive damages occurred in Minnesota; and (3) Minnesota has a strong interest in compensating tort victims.[1]

C. The situs of the Railroad Defendants' activities.

The place where relevant activities took place is important to the choice of law consideration.

The accident took place on the western edge of the town of Minot and injured exclusively Minot residents. All of the environmental cleanup and activities relating to persons injured by the derailment took place in Minot. Basic track maintenance is likewise the responsibility of local North

[1] See this Court's Memorandum of Law Denying Punitive Damages.

Dakota crews who are assigned to particular "sections" along the Canadian Pacific's mainline. Six section crews totaling nineteen employees are charged with performing basic maintenance on the "Portal Subdivision," which runs from Portal, North Dakota to Harvey, North Dakota and includes the location where the train derailed on January 18, 2002.

Overall supervision of the maintenance work done on the "Portal Subdivision" takes place in Minnesota. Soo Line Railroad Company has historic ties to Minnesota, having been headquartered here since 1915. There are approximately 1,000 employees in the Twin Cities area and multiple aspects of Soo Line Railroad operations are handled in Minnesota, including: General Assistance, Accounting, Canadian Pacific (US) Finance, Commercial Development, Copy Center, Corporate Secretary, Canadian Pacific Police Services, Customer Service Team/Revenue, Freight Claims, Legal Services, Real Estate, and Public Affairs/Regional Carriers.

Funding for both basic and program maintenance is allocated by management in Calgary, Alberta, Canada. The same Calgary management also establishes the applicable standards, policies, and procedures for both basic track maintenance and program projects.

IV. DISCUSSION OF LAW

A. Summary judgment standard.

Summary judgment is the proper mechanism for deciding important legal issues such as choice of law. Under the Minnesota Rules of Civil Procedure, summary judgment is properly granted when:

> [T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that either party is entitled to judgment as a matter of law.

Minn. R. Civ. P. 56.03.

A material issue of fact is one which would affect the outcome of the case. *Pischke v. Kellen,* 384 N.W. 2d 201, 205 (Minn. Ct. App. 1986) (citing *Rathbun v. W.T. Grant Co.,* 219 N.W. 2d 641, 646 (Minn. 1974)).

Summary judgment has been characterized as a "blunt instrument" that "should be employed only where it is perfectly clear that no issue of fact is involved in the cause of action." *Donnay v. Boulware,* 144 N.W. 2d 711, 716 (Minn. 1966). The Minnesota Supreme Court has stated that the "burden is on the moving party to show the absence of any material fact." *Bixler v. J.C. Penny Co., Inc,* 376 N.W. 2d 209, 215 (Minn. 1985) (citing *Barilla v. Clapshaw, 237* N.W.2d 830, 831 (Minn. 1976)); *see Thiele v. Stich,* 425 N.W. 2d 580, 583 (Minn. 1988) (the burden is on movant to establish that no genuine issue of material fact exists). When determining whether the moving party has sustained its burden, the court must view the evidence in a manner most favorable to the nonmoving party. *See Sauter v. Sauter,* 70 N.W. 2d 351, 353 (Minn. 1955); *Ritter v. MA. Mortenson Co.,* 352 N.W. 2d 110, 112 (Minn. Ct. App. 1984) (citing *Greaton v. Enich,* 185 N.W.2d 876, 878 (Minn. 1971)). All doubts and factual inferences must be resolved against the moving party and in favor of the nonmoving party. *Nord v. Herreid,* 305 N.W.2d 337, 339 (Minn. 1981); *see Dempsey v. Jaroscak,* 188 N.W.2d 779, 781-82 (Minn. 1971).

It is only when the movant has satisfied its burden must the nonmoving party then show the existence of a genuine issue of material fact. *Bixler, 376* N.W.2d at 215 (citing *Continental Sales and Equipment Co. v. Town of Stuntz,* 257 N.W.2d 546, 550 (Minn. 1977). If the nonmoving party fails to present specific facts indicating that a genuine issue of material fact exists, summary judgment is proper. *Hunt v. IBM Mid Am. Employees Fed. Credit Union,* 384 N.W.2d 853, 855 (Minn. 1986). In order to successfully oppose a

motion for summary judgment, the nonmoving party cannot rely upon mere averments or denials set forth in its pleadings, but must present specific facts showing that there is a genuine issue for trial. Minn. R. *Civ.* P. 56.05; *see Hunt,* 384 N.W.2d at 855 (the nonmoving party cannot rely on mere general statements of fact.). Moreover, "[t]he court is not required to save the nonmoving party by drawing unreasonable inferences." *City of Savage v. Varey,* 358 N.W.2d 102, 105 (Minn. Ct. App. 1984).

B. A choice of law determination is required.

As a threshold matter, Plaintiffs dispute whether a choice of law analysis is even necessary, especially in the context of punitive damages. A choice of law analysis is required for matters of substantive law. *Davis v. Furlong,* 328 N.W.2d 150, 153 (Minn. 1983).

Minnesota case law is silent on the issue of whether punitive damages are substantive or procedural. Nonetheless, a Minnesota Federal Court has found that statutes of limitation fall in the procedural category. *See Glover v. Merck & Co., Inc., 345* F.Supp.2d 994, 998-99 (D. Minn. 2004). There is a distinct difference, however, between the operation of statutes of limitation and motions to add claims for punitive damages. A determination of whether a statute of limitation applies works to either allow or completely deny a plaintiff his or her day in court. A claim for punitive damages on the other hand, does not extinguish the action altogether, but rather determines what damages a plaintiff is able to request.

Forum shopping is an underlying concern with both statutes of limitation and punitive damages claims, but again there are differences. Regarding statutes of limitation, plaintiffs will choose the forum that does not bar their claims due to statutes of limitation problems (as was the case in *Glover).* This will give them a day in court that they would

otherwise not or no longer have. In cases like these involving the January 18, 2002 Minot derailment, plaintiffs will select a forum based on whether the forum caps punitive damages and the threshold a plaintiff has to meet in order to add a punitive damages claim. This does not give plaintiffs a day in court they would otherwise not have, but rather facilitates their ability to seek more substantial monetary awards, in particular exemplary damages. *See Schumacher v. Schumacher*, 676 N.W.2d 685 (Minn. Ct. App. 2004) (plaintiff injured in Iowa sued in Minnesota to avoid Iowa statute which barred claim). Moreover, many Plaintiffs involved in the instant derailment undoubtedly have suffered injuries, grievously in a number of cases, and the Railroad Defendants' exposure to significant damages is very real - with or without punitive damages.

As mentioned above, the standard for being allowed to bring a claim for punitive damages is lower in Minnesota and there is no cap on punitive damages here. The marked differences between Minnesota's and North Dakota's punitive damages laws;[2] the strong North Dakota interest in this case, which will be further discussed later; and the selection of Minnesota as the forum by many of the most seriously injured Plaintiffs, lead almost inexorably to the conclusion that punitive damages should be analyzed as being substantive in nature, if only to discourage forum shopping.

Such conclusion is not without support. Courts in other states have addressed punitive damages as a matter of

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[2] This Court has denied Plaintiffs' motion to add punitive damages claims under both the North Dakota and the Minnesota standards. The fact that the outcome ended at the same point does not diminish the fact that North Dakota's threshold question for punitive damages is significantly higher than Minnesota's. In fact, this Court noted that the decision to deny punitive damage claims was not nearly as difficult under North Dakota law as it was under Minnesota law.

substantive law. *See Harlan Feeders, Inc. v. Grand Laboratories, Inc.*, 881 F.Supp. 1400, 1408 (N.D. Iowa 1995) ("[N]o authority . . . runs contrary to the proposition that punitive damages are a matter of substantive law . . ."); *Naughton v. Bankier*, 691 A.2d 712, 716 (Md. Ct. App. 1997) (punitive damages for choice of law purposes are substantive in nature).

Numerous cases - including those upon which Plaintiffs rely - have analyzed punitive damages under choice of law principles, which necessarily presupposes that such claims are substantive in nature. *See Johnson v. Occidental Fire and Cas. Co. of NC, 954* F.2d 1581, 1585 (11th Cir. 1992); *Enron Corp. v. Lawyers Title Inc. Corp.*, 940 F.2d 307, 312 (8th Cir. 1991); *In re Air Crash Disaster Near Chicago, 111.*, 644 F.2d 594 (7th Cir. 1991); *In re Aircraft Accident at Little Rock, Ark.*, 231 F. Supp.2d 852 (E.D. Ark. 2002); *Mayes v. Gordon*, 536 F. Supp. 2 (E.D. Term. 1981); *Barr v. Interbay Citizens Bank*, 635 P.2d 441 (Wash. 1981).

Cases applying the *Erie* doctrine - itself a choice of law rule - also illustrate that punitive damages are substantive matters. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) ("in a diversity action . . . when state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining the amount, are questions of state [substantive] law.") (emphasis added). *See also Griffin v. Red Run Lodge, Inc.*, 610 F.2d 1198, 1206 n.7 (4th Cir. 1979) (availability of punitive damages clearly a matter of substantive law); *Myers v. Richland County*, 288 F.Supp.2d 1013, 1021 (D.N.D. 2003) ("exemplary damages statutes provide a substantive right and therefore state law applies.").

C. The choice of law analysis points to North Dakota.

Minnesota courts apply a three part test to decide which state's laws apply: (1) is there an actual conflict between the states' laws; (2) can the laws of both states be constitutionally applied; and (3) which state's laws are favored by the five *Milkovich*[3] factors. *Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 469-70 (Minn. 1994).

1. Actual conflicts exist.

As mentioned above, a conflict exists in this case between Minnesota and North Dakota law on the issue of punitive damages. North Dakota has a cap on punitive damages and the threshold for adding a punitive damages claim *is* higher. *See Jacobson v. Universal Underwriters Ins. Group, 645* N.W.2d 741, 745 (Minn. Ct. App. 2002) (conflict existed between Minnesota law, which provided for recovery of pecuniary loss - including financial support, comfort, guidance, and protection that decedent would have provided--and Iowa law, which based damages on the estimated net value of the decedent's estate).

North Dakota tort reforms have created additional conflicts with Minnesota law concerning liability exposure. For example, a North Dakota tortfeasor's liability is several only. N.D.C.C. § 32-03.2-03. Minnesota, on the other hand, still imposes joint and several liability. Minn. Stat. § 604.02 (2004).

A conflict of law exists when there is potential, even if slight, for two states' legal standards to affect the parties differently. *Lommen v. City of E. Grand Forks,* 522 N.W.2d 148, 149 (Minn. Ct. App. 1994). North Dakota and Minnesota laws plainly conflict in establishing Defendants' exposure to and liability for damages.

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[3] *Milkovich v. Saari,* 203 N.W.2d 408 (Minn. 1973).

2. Applying both States' laws.

The second factor - whether each state's laws can be applied so as to afford due process to the parties - favors neither party. As discussed above, both Minnesota and North Dakota have sufficient contacts such that the law of either state could be constitutionally applied. This Court has previously heard motions relating to whether jurisdiction is proper in Minnesota and has ruled that Minnesota has sufficient contacts to allow the case to go forward here. This Court has also indicated on several occasions that North Dakota may have stronger interests in seeing the cases tried there, since the derailment happened in North Dakota and all of the persons injured are North Dakota residents. That North Dakota may have stronger interests does not mean, however, that suit cannot be brought here. This Court has already ruled that it can.

3. The *Milkovich* factors favor application of North Dakota law.

The actual determination of which state's laws govern involves application of the five *Milkovich* factors: (1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the state's governmental interest; and (5) application of the "better rule of law." *Jepson,* 513 N.W.2d at 470. Like Minnesota, North Dakota applies these factors to choice-of-law analysis. *See Issendorf v. Olson,* 194 N.W.2d 750, 754-55 (N.D. 1972).

In tort actions, the first three factors are usually not controlling. *Schwartz v. Consol. Freightways Corp. of Del.,* 221 N.W.2d 665, 668 (Minn. 1974) ("As pointed out in *Milkovich,* only the last two [factors] are relevant to tort cases.").[4] "Maintenance of interstate and international order"

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[4] "Predictability" is normally relevant only to "consensual transactions where the parties desire advance notice of which state law will govern in future disputes." *Nodak Mud. Ins. Co. v. American Family Mut.* Ins. Co.,

becomes significant, however, when there is evidence of forum shopping. *Jepson,* 513 N.W.2d at 471-72; *see Hague v. Allstate Ins. Co.,* 289 N.W.2d 43, 49 (Minn. 1978), *aff'd,* 449 U.S. 302 (1981).

The fifth and final factor - "application of the better rule of law"—applies only "when the other four factors are not dispositive." *Reed v. Univ. of N.D.,* 543 N.W.2d 106, 109 (Minn. Ct. App. 1996) (citing *Myers v. Gov't Employees Ins. Co.,* 225 N.W.2d 238, 244 (Minn. 1974)). This means that the second, fourth and possibly the fifth factor are applicable to the instant case.

a. Evidence of forum shopping.

Forum shopping is generally disfavored. *Petroleum Co. v. Shutts,* 472 U.S. 797, 820 (1985) ("[P]laintiffs desire for forum law is rarely, if ever controlling."); *Jepson,* 513 N.W.2d at 471-72 ("Minnesota does not have an interest in encouraging forum shopping."). The selection of Hennepin County, as discussed above suggests forum shopping on the part of Plaintiffs. *Stenzel v. State Farm Mut. Auto. Ins. Co., 379* N.W.2d *674, 676* (Minn. Ct. App. 1986) ("Forum shopping becomes a greater concern as contacts with the state diminish.").

The recent decision in *Schumacher v. Schumacher, 676* N.W.2d *685* (Minn. Ct. App. 2004) supports the application of North Dakota law. In *Schumacher,* a son was kicked in the face by his father's horse at an Iowa horse show. *Id.* at *688.* The case was filed in Minnesota where both the father and son resided, and where the father owned and raised horses. *Id.*

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604 N.W.2d 91, 94-95 (Minn. 2000). And "simplification of the judicial task" is not a concern when both states' laws are relatively clear. *Id.* Finally, "maintenance of interstate and international order" is generally not important when, as here, both states have laws directly on point that limit the likelihood of ad *hoc* interference. *Id.*

Despite the obvious ties to Minnesota, summary judgment was granted based on the immunity that Iowa law provided against injuries caused by domesticated animals. *Id.* at 689.

The Minnesota Court of Appeals was particularly concerned about the "maintenance of interstate order" because of the forum shopping implications. *Id.* at 690-91. The court found that "[t]his factor addresses whether applying Minnesota law would manifest disrespect for Iowa or impede the interstate movement of people and goods." *Id.* at 690 (citing *Jepson,* 513 N.W.2d at 471). The Court of Appeals stated that "[e]vidence of forum shopping or evidence that application of one state's law would promote forum shopping, would be an attempt to evade, and would indicate disrespect for, Iowa law." *Id.* at 690-91 (citation omitted).

The *Schumacher* court concluded that applying Minnesota law would encourage forum shopping because "[a]n Iowa citizen injured while participating in a domesticated animal activity would be quick to ascertain the state residence of the animal owner and to sue in any state that does not grant immunity to such owners for domesticated animal activities." *Id.* at 691. The court recognized that "[b]y passing the immunity statute, Iowa has stated its public policy interest in encouraging participation in agricultural activities, like this horse show, because such participation benefits Iowa's economy." *Id.* This factor favors North Dakota law.

b. Advancement of the states' interests

In addition to the discouragement of forum shopping, the advancement of the states' interest supports application of North Dakota law. The state in which the incident occurred plays an important role when addressing the advancement of the states' governmental interests.[5] Furthermore, due process

[5] Minnesota courts do not however, automatically apply the law of the state in which the accident occurred, as was historical practice under a *lex loci delecti* analysis. *Milkovich,* 203 N.W.2d at 410-13.

protections preclude Minnesota from having an interest in the assessment of punitive damages in this litigation. Thus advancement of the states' interests analysis favors application of North Dakota law.

(1) North Dakota's compelling interest.

This Court has already assessed the comparative state interests in this litigation. Turning to the case law, the *Nodak* case involved a Minnesota motorist's no-fault insurer bringing a subrogation claim against a North Dakota resident's liability insurer arising out of an automobile collision in North Dakota. 604 N.W.2d at 92-93. The North Dakota motorist's insurer sought a declaration that Minnesota law governed. *Id.* Applying *Milkovich,* the Minnesota Supreme Court readily concluded that the laws of the state in which the accident occurred, North Dakota, should govern. *Id.* at 94-97.

The Court of Appeals in *Nodak* had "determined that [the fourth *Milkovich]* factor favors application of North Dakota law because the accident occurred in North Dakota." *Id.* at 95 (citation omitted). In reaching this conclusion the appeals court relied upon *American Family Mutual Ins. Co. v. Farmers Ins. Exchange, 504* N.W.2d 307, 309 (N.D. 1993), which held that the laws of the state in which the accident occurred, North Dakota, should govern because the other factors favored neither state's laws.

Like the court of appeals, the Minnesota Supreme Court found the reasoning in *American Family* persuasive because "when all other relevant choice-of-law factors favor neither state's law, the state where the accident occurred has the strongest governmental interest." *Nodak, 604* N.W.2d at 96. In so holding, the court noted that this analysis did not reintroduce the *lex loci delecti* doctrine. *Id.* Rather, the rationale of both supreme courts was based upon each state's interest in addressing "accidents within its borders"; hence

"where all other relevant choice-influencing factors balance out, the forum with the greater interest is the forum where the accident occurred." *Id.* (citation omitted).

In this case the only other relevant choice of law consideration is the previously discussed forum shopping, which strongly favors application of North Dakota law. Thus under *Nodak* the state where the accident occurred - North Dakota - reinforces this Court's conclusion that North Dakota law should apply.

Citing a host of cases arising out of airline disasters, Plaintiffs contend that Soo Line Railroad's incorporation in Minnesota should be dispositive of the choice of law analysis. Those cases, however, turn on the "fortuitousness" of the crash site. *See, e.g., Air Crash Disaster at Sioux City, Iowa, on July 19, 1989,* 734 F. Supp. 1425, 1431 (N.D. Ill. 1990) ("Under any theory of liability, the fact that the accident occurred in Iowa was a mere fortuity."). Given the randomness of where an aircraft comes down, courts making choice of law determinations in those cases give the state of the accident no weight in the analysis. Instead, those courts emphasize the state of incorporation.

In this case, unlike the airplane disaster cases, the accident occurred at a specific place where Plaintiffs allege that the track had been negligently inspected and maintained.[6] Planes fly [6] everywhere and can crash anywhere; trains run on fixed rails and derail from those locations. Thus in many respects the fortuity in the Minot derailment is the railroad's state of incorporation, much more so than the state where the accident occurred. Unlike victims of a place crash who are injured where the aircraft happens to come down, plaintiffs in this

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[6] The complaints contain a number of allegations of negligence by the Railroad Defendants, in addition to the two mentioned here. These are discussed in this Court's Order on Federal Preemption issued alongside this Order.

case have a very definitive and strong connection to the place where their injuries occurred - they live in North Dakota. The airline disaster cases are, therefore, distinguishable.

(2) Constitutional issues

Plaintiffs suggest that Minnesota's interest in compensating tort victims should prevail over the North Dakota contacts in this case. *See, e.g., Jepson, 513* N.W.2d at 472. But punitive damages have less to do with compensating tort victims than discouraging certain corporate behavior: "[p]unitive damages are intended to punish a defendant, or to make an example of a defendant's wrongdoing, not to reward an otherwise-compensated plaintiff." *Williamson v. Prasciunas,* 661 N.W.2d 645, 653 (Minn. Ct. App. 2003). Recent United States Supreme Court cases shed light on the issue of punitive damages rights. *State Farm Mut. Auto Ins. Co. v. Campbell, 538* U.S. *408 (2003); BMW of North America, Inc. v Gore,* 517 U.S. 559 (1996).

In *BMW,* a consumer bought a new car that had been repainted before it was purchased. 517 U.S. at *563.* At trial, BMW was shown to have had sold at least *983* refinished cars nationwide, including 14 in the plaintiffs home state. *Id.* BMW argued that conduct in other states was not relevant, but the trial court disagreed, allowing the jury's award of $4,000 in compensatory damages and $4 million in punitive damages. *Id.* at 565. But because punitive damages are allowed only to "further a State's legitimate interests punishing unlawful conduct and deterring its repetition," the Supreme Court reversed. *Id.* at 568 (emphasis added).

States have no legitimate interest in imposing economic sanctions for wrongful conduct occurring in other states. *BMW,* 517 U.S. at 572. Otherwise, "Alabama would be infringing on the policy choices of other States." *Id.* Therefore, the Court held: "the economic penalties that a State ... inflicts on those who transgress its laws, whether the

penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy." *Id.*

This conclusion was recently reaffirmed *in State Farm.* The *State Farm* jury awarded punitive damages against an insurance company for bad faith handling of auto claims. 538 U.S. at 413. The plaintiff charged that the company's oppressive claims practices were nationwide in scope. *Id.* at 414. Relying on *BMW,* the insurer sought to exclude out-of-state conduct, but was denied. *Id.* The jury awarded $2.6 million in compensatory damages and $145 million in punitives.

As in *BMW,* the Supreme Court recognized that a state does not "have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *Id.* at 421. A state's authority to punish is circumscribed because: "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Id.* at 422 (citation omitted). Having conclusively limited the basis upon which punitive damages can be awarded, the Court reversed. *Id.* at 428. Lower courts have followed suit.[7] This factor favors North Dakota law.

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[7] *White v. Ford Motor Co.,* 312 F.3d 998, 1020 (9th Cir. 2002) ("punitive damages award unconstitutionally allowed a Nevada jury to punish Ford for out-of-state conduct"); *Johansen v. Combustion Eng g, Inc.,* 170 F.3d 1320, 1333 (11th Cir. 1999) ("The Supreme Court has instructed that punitive damages must be based upon conduct in a single state - the state where the tortious conduct occurred - and reflect a legitimate state interest in punishing and deterring that conduct.");

c. Application of the better rule of law

As discussed previously, the "better rule of law" factor is irrelevant unless the other factors favor neither state. This factor is of limited utility, as the Minnesota Supreme Court "has not placed any emphasis on this factor in nearly 20 years." *Nodak*, 604 N.W.2d at 96. Given the conclusions previously reached, analysis of this factor is unnecessary.

CONCLUSION

Minnesota and North Dakota both have interests in the litigation in these cases. The January 18, 2002 derailment happened in North Dakota and all of the injured persons reside there. At the same time, the cases involve a defendant with ties to Minnesota going back over eighty years, with employees in Minnesota and considerable operations here. All of the factors used by Minnesota courts to address the choice of law issue unanimously weigh in favor of applying North Dakota law. North Dakota law shall therefore be applied to all cases before this Court stemming from the January 18, 2002 derailment.

TNL

Continental Trend Res., Inc. v. OXY USA Inc., 101 F.3d 634, 637 (10th Cir. 1996) *(BMW* "prohibit[s] reliance upon inhibiting unlawful conduct in other states"); *Ace v. Aetna Life Ins. Co., 40* F.Supp.2d 1125, 1133 (D. Alaska 1999) *(BMW* means that "Alaska must leave some room within which the other states can exercise their own interests in defining the precise extent of and in deterring wrongful conduct"); *EEOC v. Wal-Mart Stores, Inc.*, 11 F.Supp.2d 1313, 1326 (D.N.M. 1998) (punitive damages award must relate to conduct occurring within the state); *People ex rel Lockyer v. R.J. Reynolds Tobacco Co.*, 11 Cal. Rptr. 3d 317, 347 (Ct. App. 2004) *("State* does not have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction.").

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 05-1918MN, et al.

TOM LUNDEEN, ETC., *et al.*,
Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY, *et al.*,
Appellants.

Appeals from the United States District Court for the
District of Minnesota

The parties are directed to file additional briefs as to whether the remand to state court was appropriate notwithstanding the forum shopping argument briefed to the panel. The briefs should address whether there is federal jurisdiction through jurisdictional or "complete" preemption. Additionally, the briefs should examine such cases as *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), and *Grable & Sons Metal Products, Inc. v. Dame Engineering & Manufacturing*, 125 S. Ct. 2363 (2005), for whether federal jurisdiction lies regardless.

The briefs shall be filed simultaneously and are due on March 3, 2006.

February 13, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

No. 05-107

In the Supreme Court of the United States

WARREN DAVIS, PETITIONER

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record
GREGORY G. GARRE
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Solicitor of Labor
NATHANIEL I. SPILLER
Assistant Deputy Solicitor
MARK S. FLYNN
Counsel for Advice and Statutory Programs
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction over the district court's order remanding petitioner's claims to state court.

2. Whether petitioner's state-law claims are completely preempted by Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481-483.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 481-483, establishes substantive rules governing union elections and provides comprehensive procedures for enforcing those rules. *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 531 (1972). A union member alleging violations of Title IV may file a complaint with the Secretary of Labor. 29 U.S.C. 482(a). The Secretary must investigate the complaint, determine if there is probable cause to believe that a violation of Title IV has occurred and not been remedied, and, if so, file suit to obtain relief in United States district court. 29 U.S.C. 482(b) and (c).

Title IV is explicit that "[t]he remedy provided by this [title] for challenging an election already conducted shall be exclusive." 29 U.S.C. 483. Accordingly, there is no private right of action to challenge the validity of a union election. *Local No. 82, Furniture & Piano Moving* v. *Crowley*, 467 U.S. 526, 544 (1984). However, a union member may challenge the Secretary's decision not to bring suit, *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), and may intervene in a suit brought by the Secretary, *Trbovich*, 404 U.S. at 536.

2. Petitioner held an elected position—Director of Region 2—within respondent International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW). Pet. App. 2a, 14a. After announcing his intention not to run for reelection and endorsing his assistant director, petitioner arranged at the UAW's Constitutional Convention

for his assistant to withdraw from the election and to nominate him instead. *Id.* at 2a-3a. Petitioner won the election unopposed. *Id.* at 3a.

Petitioner was a member of an unofficial caucus of UAW officers who had informally agreed not to seek office after age 65. Pet. App. 3a. Several members of the caucus were angered by petitioner's surprise decision to run again for office at age 67. *Ibid.* Those members issued a press release stating that petitioner had lied about his plans for retirement and schemed "to deny an honest election to the membership." *Id.* at 10a. The press release called upon UAW convention delegates to eliminate Region 2, redistribute its members among three other regions, and hold new elections in the reconstituted regions. *Id.* at 3a. The delegates voted to eliminate Region 2 and divide it among the other regions. *Ibid.* Elections were held for directors of the new regions, but petitioner did not run in those elections. C.A. App. 328.

3. a. Petitioner sued the UAW in federal district court alleging a violation of Title I of the LMRDA, 29 U.S.C. 411(a)(1) and (2). Pet. App. 3a. The district court dismissed the suit on the ground that it challenged the validity of the UAW's elections and thus was within the exclusive jurisdiction of the Secretary under Title IV. *Davis* v. *UAW*, 274 F. Supp. 2d 922 (E.D. Mich. 2003). The court of appeals affirmed the dismissal. *Davis* v. *UAW*, 390 F.3d 908 (6th Cir. 2004), cert. denied, 125 S. Ct. 1984 (2005).

b. Petitioner also filed a Title IV complaint with the Secretary in which he contended that the elimination of Region 2 was invalid and that he should be installed as Region 2 Director. The Department of Labor conducted an investigation and determined that there had been no violation of Title IV. C.A. App. 328-330. The Department reasoned that the UAW's governing rules did not impose an age limitation on candidacy for union office and that the convention delegates followed the

procedures mandated by the UAW's constitution when they voted to eliminate Region 2. *Id.* at 329-330. Petitioner did not seek judicial review of the Department's determination.

4. In June 2003, petitioner filed this suit in Ohio state court against respondents. Petitioner alleged age discrimination, conspiracy to discriminate on the basis of age, wrongful discharge, retaliation, libel, and defamation, all in violation of Ohio law. Pet. App. 4a. He sought declaratory and injunctive relief, including an order directing respondents to reinstate him as Region 2 Director, as well as back pay, damages, and attorney's fees. C.A. App. 16. Respondents removed the case to federal district court. Pet. App. 4a. As relevant here, they contended that petitioner's claims were completely preempted by Title IV of the LMRDA because the claims would require a determination of the validity of the UAW's elections. *Ibid.* Petitioner filed a motion to remand the case, and the district court granted the motion. *Id.* at 12a-32a.

The district court first observed that "the exclusive remedy for challenging the results of a [u]nion election is by pursuing administrative procedures prescribed by the Secretary of Labor." Pet. App. 29a. The court noted that respondents argued that, in order to decide "one aspect of the relief sought by [petitioner]: reinstatement," the court would be forced "to choose between conflicting Union election results." *Ibid.* The court suggested that the reinstatement claim may therefore have provided the court with "federal preemption jurisdiction." *Id.* at 30a. The court believed, however, that petitioner had abandoned his request for reinstatement in his briefing on the remand motion, thus "mooting" that potentially adequate ground for "LMRDA preemption." *Ibid.*[1] The court concluded that none of petitioner's remaining grounds for

[1] The court was apparently mistaken. See Pet. App. 7a. Both parties agree that petitioner has not abandoned his claim for reinstatement. Pet. 6; Pet. C.A. Br. 11; Resp. C.A. Br. 38.

relief implicated "federal preemption jurisdiction," "necessarily impl[ied] * * * that one or more of the Union's election results were invalid," or was inconsistent with the LMRDA. *Id.* at 30a-31a. The court therefore determined that removal of the case was "not well-taken," and it remanded the case to state court. *Id.* at 32a.[2]

5. The court of appeals reversed and remanded the case to the district court with instructions to dismiss petitioner's claims as precluded by the LMRDA. Pet. App. 1a-11a.

The court first addressed its jurisdiction over the appeal in light of 28 U.S.C. 1447(d), which precludes appellate review of remands authorized by 28 U.S.C. 1447(c), such as remands for lack of subject matter jurisdiction at the time of removal. Pet. App. 6a; see *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). The court determined that, "[w]here a district court had proper jurisdiction at the time of removal, but events occurring after removal make remand to the state courts appropriate, § 1447(d) does not bar appellate review of the district court's remand order." Pet. App. 6a (citing *First Nat'l Bank of Pulaski* v. *Curry*, 301 F.3d 456, 459 (6th Cir. 2002) (reviewing district court order that remanded supplemental state claims after having resolved federal claims)).

Here, the court of appeals concluded, the district court believed it possessed subject matter jurisdiction at the time of the removal. Pet. App. 7a. The court of appeals reasoned that, in deciding to remand the case, the district court "plainly relied" on its belief that petitioner had, subsequent to removal, "expressed his intent to abandon [his] claim" for reinstatement. *Ibid.* Because the district court remanded the case only after finding that this post-removal event had deprived it of jurisdiction (*i.e.*, eliminated the only federal issue

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[2] Because the district court "conclude[d] it does not have jurisdiction over the case," the court declined to rule on respondents' motions to dismiss the case and to transfer venue. Pet. App. 13a-14a.

from the case), the court of appeals concluded that it had appellate jurisdiction over the remand order. *Id.* at 7a-8a (citing *First Nat'l Bank of Pulaski*, 301 F.3d at 460).

As to the merits of the remand order, the court of appeals concluded that petitioner's state-law claims were properly removed to federal court and were preempted by the LMRDA. Pet. App. 8a-11a. The court reasoned that the claims of age discrimination, wrongful discharge, and retaliation "logically hinge on [petitioner's] assertion that he was lawfully elected," and claims for "post-election relief are relegated to the exclusive jurisdiction of the Secretary of Labor." *Id.* at 10a. The court determined that the remaining claims for libel and slander would likewise "necessarily require a court to revisit" the Secretary's determination that the UAW elections were valid. *Id.* at 11a. The court therefore held that those "claims are also preempted by Title IV of the LMRDA." *Ibid.*

DISCUSSION

The court of appeals concluded that it had appellate jurisdiction based on the well-settled rule that remand orders declining to exercise supplemental jurisdiction are subject to appellate review. That conclusion was based on the unique circumstances of this case and does not implicate any conflict among the courts of appeals that warrants this Court's plenary review. The court of appeals' determination that this case was properly removed to federal court also does not warrant review. There is no conflict among the courts of appeals on whether the LMRDA completely preempts state-law claims challenging the validity of union elections. The question whether there can be complete preemption when the plaintiff cannot invoke an alternative federal cause of action is not properly before the Court. In any event, this case is not an appropriate vehicle through which to resolve that abstract question. The petition for a writ of certiorari should therefore

be denied. Alternatively, the Court may wish to hold the petition pending the Court's decisions in *Kircher* v. *Putnam Funds Trust*, No. 05-409 (argued Apr. 24, 2006), and *Osborn* v. *Haley*, cert. granted, No. 05-593 (May 13, 2006), which involve the application, in different contexts, of 28 U.S.C. 1447(d).

I. THE APPELLATE JURISDICTION QUESTION DOES NOT WARRANT PLENARY REVIEW

A. The Court Of Appeals Based Its Jurisdiction On The Established Rule That Remand Orders Declining Supplemental Jurisdiction Are Subject To Appellate Review

Section 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. 1447(d).[3] This Court has stated, however, that Section 1447(d) must be read *in pari materia* with 28 U.S.C. 1447(c) and therefore bars appellate review only of remands based on the grounds covered by Section 1447(c). *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-346 (1976); *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127-128 (1995). If a remand is based on a ground not covered by Section 1447(c), Section 1447(d) does not necessarily foreclose appellate review. *Thermtron*, 423 U.S. at 345; *Things Remembered*, 516 U.S. at 127.

One ground for remand not covered by Section 1447(c) is a remand of supplemental state-law claims for one of the reasons set forth in 28 U.S.C. 1367(c). For example, when the federal claim in a case is dismissed or abandoned, the district court may remand the case if the court concludes that it is inappropriate to retain jurisdiction over the state-law claims. *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 357 (1988).

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[3] Section 1447(d) excepts from its scope remands in civil rights cases removed under 28 U.S.C. 1443. That exception is not implicated here.

Although this Court has not addressed the question, see *Things Remembered*, 516 U.S. at 129-130 (Kennedy, J., concurring), the courts of appeals have uniformly concluded that remands declining supplemental jurisdiction are subject to appellate review. See 16 James W. Moore et al., *Moore's Federal Practice* § 107.44[2][d], at 107-262 n.53.5 (3d ed. 2006) (citing cases).

The court of appeals relied on that rule in concluding that it had appellate jurisdiction here. The court observed that the district court "plainly relied" on petitioner's purported abandonment of his reinstatement claim "in remanding the case." Pet. App. 7a. "Because the district court remanded [the] case only after finding that [this] post-removal event had deprived it of subject matter jurisdiction," the court of appeals concluded that appellate jurisdiction was proper. *Ibid.* The court explained that, "[w]here a district court had proper jurisdiction at the time of removal, but events occurring after removal make remand to the state courts appropriate, § 1447(d) does not bar appellate review." *Id.* at 6a. The court supported that proposition with a citation to *First National Bank of Pulaski* v. *Curry*, 301 F.3d 456, 459 (6th Cir. 2002), a case in which it had reviewed a district court order remanding supplemental state claims after the court had resolved the federal claims in the case.

Some language in the opinion below could be read to suggest that the decision rested on different reasoning. See, *e.g.*, Pet. App. 7a (referring to a conclusion by the district court that "subject matter jurisdiction had been lost" rather than a discretionary decision by that court not to exercise supplemental jurisdiction). But the court of appeals has clarified its rationale in a subsequent decision. In *DaWalt* v. *Purdue Pharma, L.P.*, 397 F.3d 392 (2005), the Sixth Circuit stated that the post-removal event "doctrine is implicated only when a district court makes a discretionary remand of pendent

state-law claims following the dismissal of a claim or a party." *Id.* at 401. The court cited this case as an example, describing it as a case "reviewing the district court's remand order when a party had 'expressed his intent to abandon [a] claim,' thus converting a case over which the court had subject matter jurisdiction into a case that the district court could remand in its discretion under § 1367." *Ibid.* (quoting Pet. App. 7a). *DaWalt* therefore makes clear that this case does not stand for any broader proposition in the Sixth Circuit.

B. Review Is Not Warranted To Address The Reviewability Of Remand Orders Declining Supplemental Jurisdiction

Petitioner contends (Pet. 16-20) that this Court should grant certiorari to decide whether the court of appeals was correct in concluding that remand orders declining supplemental jurisdiction are subject to appellate review. But there is no reason for this Court to address that question. Petitioner himself acknowledges that all of the courts of appeals that have addressed the issue agree that remand orders declining supplemental jurisdiction are reviewable. Pet. 10; Pet. Reply 4. Moreover, the uniform view of the courts of appeals appears to be consistent with this Court's decisions, which suggest that appellate review is barred only for the categories of remand orders described in Section 1447(c)—*i.e.*, those based on lack of subject matter jurisdiction and those based on other defects in removal. See *Thermtron*, 423 U.S. at 346; *Things Remembered*, 516 U.S. at 127; 28 U.S.C. 1447(c).

Even if this Court's guidance were needed on the question whether remand orders declining supplemental jurisdiction are subject to appellate review, this case would not be an appropriate vehicle through which to provide that guidance. Although the court of appeals treated the case as one in which the district court had declined jurisdiction under 28 U.S.C. 1367(c), it acknowledged that the district court had operated

on the erroneous belief that petitioner had abandoned his reinstatement claim. See note 1, *supra*. Moreover, rather than simply correct that error and remand to the district court, the court of appeals went on to rule that petitioner's claims were properly removed, an issue that would not otherwise have been appealable. If the district court had realized that the reinstatement claim had not been abandoned or the court of appeals had done no more than correct that error and remand, then the district court would have had only two options: (1) retain jurisdiction over the entire case on the theory that the LMRDA completely preempts the reinstatement claim or (2) remand the case on the theory that there is no complete preemption and therefore the court lacked jurisdiction at the time of removal. Neither option would have involved a remand under Section 1367(c), and neither option would have produced an immediately appealable order.

This Court should not address the propriety of appellate review of remand orders under Section 1367(c) in a case that, but for the district court's acknowledged factual error, could not possibly involve a valid remand under that Section. The peculiarity created by the district court's mistaken belief that petitioner had abandoned the reinstatement claim makes this a poor vehicle through which to address that issue.

C. Any Tension Among The Courts Of Appeals On How To Ascertain The Basis For A Remand Order Does Not Warrant Review In This Case

Petitioner contends (Pet. 11-15) that the Court should grant review because the courts of appeals disagree on whether they may look beyond the face of a remand order to determine the actual basis for the remand. Although there may be some tension among the courts of appeals on how to ascertain the basis for a remand order, this Court's review of that question in this case would be premature.

Contrary to petitioner's portrayal of a deep split among the courts of appeals, those courts generally agree that they may analyze a remand order to determine if there is a non-Section 1447(c) basis for the remand, even if the district court has stated that it lacks jurisdiction or has cited 28 U.S.C. 1447(c) or (d). See *Cogdell* v. *Wyeth*, 366 F.3d 1245, 1247-1249 (11th Cir. 2004); *Lindsey* v. *Dillard's, Inc.*, 306 F.3d 596, 599 (8th Cir. 2002); *Archuleta* v. *Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997); *Mangold* v. *Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996); *Baldridge* v. *Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1349 (6th Cir. 1993). Cf. *Spielman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 128 (2d Cir. 2003) (analyzing ambiguous order to determine basis for remand); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) (same).[4]

Statements in some cases suggest that the Fifth Circuit takes a more restrictive approach and views the district court's characterization of its remand order as controlling. The Fifth Circuit has said that "[r]eviewability of a remand order depends entirely upon the trial court's stated grounds

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[4] Petitioner contends (Pet. 12, 15) that the Tenth Circuit treats a district court's good-faith statement that it lacked jurisdiction as conclusively establishing that the remand order was based on Section 1447(c). That is incorrect. In *Archuleta*, the Tenth Circuit held that, notwithstanding "[a] district court's assertion that it lacks subject matter jurisdiction, and even explicit references to § 1447(c)," the court of appeals "will determine by independent review the actual grounds upon which the district court believed it was empowered to remand." 131 F.3d at 1362. Petitioner also misreads the Third Circuit's statement in *Balazik* v. *County of Dauphin*, 44 F.3d 209, 213 (1995), that appellate "review is forestalled only when the *stated reasons* for the remand include procedural or jurisdictional defects." In making that statement, the court meant only that "review is not proscribed even if a remand could have been ordered based on a § 1447(c) ground, but was not." *Ibid.* The court nowhere suggested that it could not analyze a remand order to determine the basis on which the district court actually remanded the case.

for its decision to remand." *Tillman* v. *CSX Transp., Inc.*, 929 F.2d 1023, 1026 (5th Cir.), cert. denied, 502 U.S. 859 (1991). That court of appeals has also said that it will deny appellate review pursuant to Section 1447(d) where the district court has stated that it is remanding for lack of jurisdiction, unless "the district court [has] 'clearly and affirmatively' relie[d] on a non-§1447(c) basis" for the remand. *Heaton* v. *Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000) (quoting *Copling* v. *Container Store, Inc.*, 174 F.3d 590, 596 (5th Cir. 1999)), cert. denied, 533 U.S. 915 (2001).

The apparent tension in methodology between the Fifth Circuit and the other courts of appeals does not warrant this Court's review at this time. First of all, it is not clear that this kind of disparate methodology gives rise to the type of circuit split that merits this Court's review. Unlike disagreements on broader issues of law, this kind of methodological dispute may have more impact on how district court judges draft remand orders than on the rights of the parties.

Second, it is also unclear how much practical difference there is between the two approaches. Like the other courts of appeals, the Fifth Circuit recognizes that it must examine the remand order to determine whether the district court intended to state a Section 1447(c) ground for remand and that there may be ambiguities in the order that require resolution. For example, in *Heaton*, the court of appeals undertook "a plain and common sense reading" of the remand order before concluding that the "order reveals that [the district court] stated a § 1447(c) basis for remand," and the court of appeals analyzed the order to determine that there was no "'mislabeling' of the basis for remand." 231 F.3d at 997-998. Moreover, in describing a prior decision, the court explained that "elucidation of the grounds for remand was required in order to determine the district court's reasons for remanding"

because "the remand order * * * was at first glance somewhat ambiguous." *Id.* at 998.

Third, even if the Fifth Circuit's different approach may have a practical impact, that court might still align itself with the other courts of appeals without this Court's intervention. The Fifth Circuit has not addressed the issue in an *en banc* opinion. And there is some tension between the Fifth Circuit's approach and this Court's cases on appellate jurisdiction. This Court's cases indicate that "[t]he label attached by the District Court to its own opinion does not, of course, decide * * * the jurisdictional issue," and that the appellate court must "determin[e] * * * the appealability of the trial court's action not by the name the court gave [its decision] but by what in legal effect it actually was." *United States* v. *Sisson*, 399 U.S. 267, 279 n.7 (1970) (citations omitted); see *Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.7 (1990) (stating that "[t]he label used by the District Court * * * cannot control the order's appealability in this case").

If the Fifth Circuit's approach proves both significant and persistent, this Court could grant review in an appropriate case from the Fifth Circuit to correct the problem. This case, however, is not a good one in which to resolve any tension between the Fifth Circuit and the other courts of appeals. The Sixth Circuit may well have decided this case the same way even if it followed the Fifth Circuit's approach. Although the court of appeals here clearly engaged in some exegesis, it looked to the text of the district court's order in ascertaining the basis for the remand. The remand order did not invoke Section 1447(c) and did not state that the district court lacked jurisdiction *at the time of removal*.[5] On the con-

[5] The district court stated that it was not ruling on certain motions "[g]iven that [it] concludes it does not have jurisdiction over the case." Pet. App. 13a-14a. But courts sometimes use the term jurisdiction imprecisely. See *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004). And it is far from clear

trary, as the court of appeals noted, the remand order "plainly relied" on petitioner's purported abandonment of his claim for reinstatement. Pet. App. 7a. The court of appeals therefore concluded that the order indicated that the district court believed it had jurisdiction at the time of removal and thus was not relying on Section 1447(c). See *ibid.* Instead, the court of appeals determined, the remand was clearly based on a non-Section 1447(c) ground—the district court's conclusion that a post-removal event had eliminated any federal claims from the case and "[made] remand to the state courts appropriate." *Id.* at 6a; see *id.* at 7a-8a.

D. The Court May Wish To Hold This Case Pending Its Decisions in *Kircher* and *Osborn*

As petitioner observes (Pet. 13-14), there is a conflict among the courts of appeals regarding appellate jurisdiction over remand orders issued under the Securities Litigation Uniform Standards Act of 1998 (SLUSA). That conflict is not presented here but is at issue in *Kircher*, No. 05-409. Specifically, *Kircher* presents the question whether 28 U.S.C. 1447(d) precludes appellate jurisdiction over remand orders issued after the district court has determined that claims, which were originally removed under SLUSA's removal provision, do not fall within the scope of SLUSA's preemption provision. See 15 U.S.C. 77p(c) and (d)(4), 78bb(f)(3)(D). The Court's resolution of that question is likely to turn primarily on factors unique to the SLUSA statutory scheme. Nonetheless, to the extent the Court's decision in *Kircher* sheds light on the proper interpretation of Section 1447(d), the Court

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that the district court here meant that it did not have jurisdiction *at the time of removal*, which is the critical inquiry under Section 1447(c), *Pullman Co.* v. *Jenkins*, 305 U.S. 534, 537 (1939), as opposed to meaning that it no longer had jurisdiction because it had decided to remand the state-law claims.

may wish tc hold the petition in this case pending that decision.

The Court may also wish to hold the petition in this case pending the Court's decision in *Osborn*, No. 05-593. In that case, this Court has asked the parties to brief the question whether Section 1447(d) bars appellate review of an order that overturns the substitution of the United States for a federal employee defendant under the Westfall Act, 28 U.S.C. 2679(d), and also remands the case to state court. Like *Kircher*, *Osborn* may provide guidance on how to interpret Section 1447(d). The Court may therefore wish to defer action on this case until the Court has resolved *Osborn* as well. However, because of the different contexts in which Section 1447(d) arises in this case and in *Osborn* and *Kircher*, and because this case does not independently warrant review, it would also be appropriate for the Court to deny the petition rather than carry this case on the Court's docket for a lengthy period of time.

II. THE COMPLETE PREEMPTION QUESTION IS NOT PROPERLY PRESENTED AND, IN ANY EVENT, DOES NOT WARRANT PLENARY REVIEW

Petitioner also seeks review (Pet. 20-26) of the court of appeals' ruling on the merits of the removal question that this case was properly removed to federal court. The issue framed by petitioner is not properly presented and, in any event, does not warrant this Court's review.

Under 28 U.S.C. 1441(b), a civil action filed in state court may be removed to federal court if the plaintiff's claim "aris[es] under" federal law. See *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 6 (2003). Whether an action arises under federal law is determined by the well-pleaded complaint rule, which requires that a federal question be presented by the plaintiff's properly-pleaded complaint. Because a defense

is not part of the plaintiff's well-pleaded statement of his claim, and federal preemption is ordinarily only a defense, preemption generally does not provide a basis for removal. *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 207 (2004). Preemption does provide a basis for removal, however, when a federal cause of action occupies the field within which the plaintiff's claim arises and therefore "wholly displaces" any state-law causes of action on which the plaintiff might otherwise rely. *Beneficial Nat'l Bank*, 539 U.S. at 8. Where such "complete preemption" exists, the plaintiff's properly-pleaded claim "necessarily arises" under federal law even if the plaintiff purports to base the claim entirely on state law. *Id.* at 9; see *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 (1987) (citing *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 (1983)). Generally, there are two prerequisites for complete preemption: (1) Congress must have created an "exclusive cause of action," and (2) the plaintiff's claim must "come[] within the scope of that cause of action." *Beneficial Nat'l Bank*, 539 U.S. at 8-9; see *Franchise Tax Bd.*, 463 U.S. at 24; *Caterpillar*, 482 U.S. at 388-399.

Petitioner contends that the LMRDA does not completely preempt his state-law claims because, although it gives the Secretary of Labor an exclusive cause of action to challenge the UAW's election on petitioner's behalf, the statute does not give petitioner himself a cause of action. That issue does not warrant review. There is no conflict among the courts of appeals on whether there can be complete preemption by the LMRDA. Indeed, no court, including the Sixth Circuit in this case, has squarely addressed the issue. And the abstract question whether there can ever be complete preemption when the plaintiff himself lacks a federal cause of action is not properly presented by this case, because it was not pressed or passed upon below.

A. There Is No Conflict Among The Courts Of Appeals On Whether The LMRDA Completely Preempts State-Law Claims Challenging Union Elections

The Sixth Circuit in this case is the only court of appeals that has addressed the propriety of removing ostensible state-law claims to federal court based on Title IV of the LMRDA. Even that court, however, did not conduct a traditional complete preemption analysis as set out in this Court's cases. See Pet. App. 8a-11a. Instead, the court of appeals referred generically to preemption and may have decided this case based on the erroneous premise that ordinary preemption is sufficient to justify removal. See *id.* at 11a (reasoning that remand was improper because petitioner's claims were "preempted by Title IV of the LMRDA"). Thus, there is no conflict among the courts of appeals on whether the LMRDA satisfies the requirements for *complete* preemption. Indeed, no court of appeals has squarely addressed that question. It would therefore be premature for this Court to address the issue here.

B. The Complete Preemption Question Presented By Petitioner Is Not Properly Before The Court

Petitioner contends (Pet. 20-26) that the Court should grant review to resolve a conflict in the courts of appeals over whether a claim can be completely preempted by a federal statute that does not provide the plaintiff with a private cause of action. That issue is not properly presented in this case.

Petitioner did not argue in the court of appeals that there is no complete preemption here because the LMRDA does not provide him with a cause of action. Petitioner does not dispute his failure to raise that issue below, but he contends that the issue is merely "a new argument" in support of his claim that there is no complete preemption. Pet. Reply 6. Far from being an additional argument in support of that claim, how-

ever, the cause-of-action question is the only complete-preemption issue that petitioner asks this Court to resolve. The question presented in the petition is framed entirely in terms of whether complete preemption can occur "absent a determination that Congress created an alternative private right of action." Pet. i. Because petitioner did not present that issue to the court of appeals, that court did not address the issue.

This Court does not generally address issues that were neither pressed nor passed upon in the court below. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). There is no reason for the Court to make an exception here.

C. The Novel And Abstract Nature Of The Complete Preemption Question Also Counsels Against Review

Even if the complete preemption question raised by petitioner were properly presented, this case would not be an appropriate one in which to address it. The question whether a federal statute can completely preempt a plaintiff's state-law claims if it does not provide the plaintiff with a cause of action should not be addressed in the abstract. Rather, it should be addressed in the context of a specific statute, and in light of judicial decisions carefully construing the statute, because the answer to the question may vary depending on the particular features of the statutory scheme. No court of appeals has addressed the cause-of-action question in the context of the LMRDA. There is no reason for this Court to attempt to resolve it in the first instance.[6]

The LMRDA falls within the class of federal statutes that displace state causes of action, provide a substitute federal

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[6] Moreover, the Court could not address the complete preemption issue without first deciding whether the court of appeals correctly exercised appellate jurisdiction, a question which, as explained above, implicates idiosyncratic aspects of the decision below and is not worthy of plenary review.

cause of action, but strictly limit the class of plaintiffs who can invoke that cause of action. The LMRDA creates an exclusive federal cause of action to challenge union elections but allows only the Secretary of Labor to invoke that cause of action. See 29 U.S.C. 482(b); *Local No. 82, Furniture & Piano Moving* v. *Crowley*, 467 U.S. 526, 544 (1984). For that category of statutes, the first prerequisite for complete preemption is clearly met: there is an exclusive federal cause of action. The complete preemption inquiry therefore can be understood as turning on whether the second requirement is met, *i.e.*, whether the plaintiff's claim comes within the scope of the federal cause of action. See p. 15, *supra*.

Some of this Court's precedents indicate that the fact that a particular plaintiff is not entitled to invoke a cause of action means that his claim is not within the scope of that cause of action. For example, in *Franchise Tax Board*, this Court held that Section 502(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1132(a), did not completely preempt a suit for back taxes by a state tax board against an employee benefit plan because the suit did not "come[] within the scope of one of ERISA's causes of action." 463 U.S. at 25. The Court reasoned that Section 502(a) does not provide a cause of action to anyone other than "participants, beneficiaries, or fiduciaries," and therefore "[a] suit for similar relief by some other party [like the tax board] does not 'arise under' that provision." *Id.* at 27.

Other of the Court's precedents, however, suggest that a plaintiff's ineligibility to invoke a federal cause of action does not conclusively establish that his claim is outside the scope of that cause of action. In *Avco Corp.* v. *Aero Lodge No. 735, International Ass'n of Machinists*, 390 U.S. 557 (1968), this Court held that an employer's state lawsuit seeking an injunction prohibiting a union from striking fell within the scope of Section 301 of the Labor-Management Relations Act, 29

U.S.C. 185, and was completely preempted, even though the Norris-LaGuardia Act barred the employer from seeking the injunction under Section 301. See 390 U.S. at 560-561. *Avco* demonstrates that a plaintiff's ostensible state-law claim may come within the scope of a federal cause of action and be completely preempted, even if the cause of action does not provide the plaintiff with a remedy. *Caterpillar*, 482 U.S. at 391 n.4. *Avco* thus supports an argument that a plaintiff's claim may fall within the scope of a federal cause of action and be completely preempted, even if the plaintiff is unable to state a valid claim under the cause of action, provided that the plaintiff's claim is within the field regulated by the cause of action. Moreover, when the limits on the federal cause of action are an integral part of the federal scheme, it would seem counterintuitive to find a claim to be not completely preempted precisely because it seeks relief antithetical to the pervasively federal regime.

There is a reasonable argument that private-party claims challenging union elections fall within the field addressed by the LMRDA's exclusive cause of action. The LMRDA makes clear that the remedy it provides is the exclusive means to challenge those elections. 29 U.S.C. 483. Although only the Secretary can bring suit to challenge election results, the Secretary's suit is triggered by a complaint filed by a private party who is aggrieved by the results. 29 U.S.C. 482(a). The Secretary is required to bring suit if there is probable cause to believe that there has been an unremedied violation of the LMRDA that may have affected the outcome of the election. 29 U.S.C. 482(b) and (c). The aggrieved party may seek judicial review of a decision by the Secretary not to bring suit and may intervene in a suit once it has been brought. See *Dunlop* v. *Bachowski*, 421 U.S. 560, 566 (1975); *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 536 (1972).

Given the unique nature of the LMRDA's remedial scheme and the case law discussed above, whether the cause of action provided by the LMRDA gives rise to complete preemption is not free from doubt. Because that question has not arisen with any frequency, has not yet been squarely addressed by any court of appeals, and is not properly presented in this case, this Court should not undertake to resolve the question here.

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the Court may wish to hold the petition pending the Court's decisions in *Kircher*, No. 05-409, and *Osborn*, No. 05-593.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
GREGORY G. GARRE
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General

HOWARD M. RADZELY
Solicitor of Labor
NATHANIEL I. SPILLER
Assistant Deputy Solicitor
MARK S. FLYNN
Counsel for Advice and Statutory Programs
Department of Labor

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No. 06-528

IN THE

Supreme Court of the United States

TOM LUNDEEN, *et al.*,
Petitioners,

v.

CANADIAN PACIFIC RAILWAY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY

Paul Alan Levy
(Counsel of Record)
Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

George G. Eck
Sarah A. Herman
Kristy L. Albrecht
Dorsey & Whitney LLP
51 North Broadway, Suite 402
P.O. Box 1344
Fargo, ND 58107-1344
(701) 235-6000

Collin P. Dobrovolny
Bryan L. Van Grinsven
McGee, Hankla, Backes
& Dobrovolny P.C.
15 - 2nd Avenue W.
Wells Fargo Bank Center
Suite 305
P.O. Box 998
Minot, ND 58702-0998
(701) 852-2544

Attorneys for Petitioners
December 29, 2006

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The petition raises two important questions of federal law that have vexed the lower courts: (1) whether one precondition for removal under the complete preemption doctrine is that the preempting federal statute must provide a federal cause of action that supplants the state-law claim under which the plaintiff sought to sue; and (2) whether federal preemption by the Federal Railroad Safety Act ("FRSA") is a mere defense, not a basis for complete preemption.

The opposition is based primarily on the proposition that the Eighth Circuit was correct, not on the absence of severe disagreements among the lower courts on the preconditions for complete preemption. Respondents also argue that the courts of appeals are in general agreement about whether there is complete preemption of state-law tort claims under the FRSA. Respondents mischaracterize the questions presented, ignore the widespread division among the lower courts on the issues presented, and recast the decision below as providing for an even broader basis for complete preemption than even the Eighth Circuit advanced.

1. Certiorari Should Be Granted to Decide Whether There Can Be Complete Preemption by a Federal Statute That Does Not Provide a Federal Cause of Action Supplanting the Removed State Claims.

Broad disagreement exists among the courts of appeals about whether a federal statute can be invoked as a basis for removal pursuant to the doctrine of complete preemption if that statute does not provide a cause of action that displaces a state-law claim that is removed to federal court. Addressing that issue in cases removed under a wide variety of federal statutes, the First, Second, Third, Fourth, Seventh, Ninth, Tenth and Eleventh Circuits have all held that provision of a federal cause of action by the federal statute is a precondition for removal, Pet. at 14-17, while the Eighth Circuit has held that the federal statute need **not** provide a federal cause of action, *id.* at 16-17, 24, and the Sixth Circuit has also allowed complete preemption

despite the absence of a federal cause of action. *Id.* at 17. The Fifth Circuit has been on both sides of the divide, amplifying the need for this Court's review. Pet. at 14 n.3, 16 n.5.

Instead of candidly acknowledging this widespread disagreement, respondents try to avoid review not by meeting the petition head on, but by mischaracterizing the first question presented. Respondents ignore the fact that the conflict at issue is about whether the federal statute must provide a **cause of action**, recasting the issue as whether plaintiffs have a **particular federal remedy**. Respondents quite correctly note that a specific federal remedy need not be available, because, for example, in *Avco Corp. v. Machinists Lodge No. 735*, 390 U.S. 557 (1968), removal was allowed even though the governing federal law, section 301 of the Labor-Management Relations Act, which provided a federal cause of action, was understood at the time as not affording a basis for injunctive relief. Similarly, in *Caterpillar v. Williams*, 482 U.S. 386 (1987), the Court affirmed the Ninth Circuit's rejection of removal on the basis of complete preemption, but rejected the Ninth Circuit's reasoning that federal law needed to provide the same remedy that the state court plaintiffs had been seeking.

These two cases illustrate the flaw in respondents' reasoning, however, and show that complete preemption depends on whether the federal statute creates a displacing cause of action that transforms the state-law claim into a federal one. In *Avco*, the employer brought its claim to enforce a collective bargaining agreement, whose enforcement had been held to arise exclusively under federal law regardless of how the employer chose to characterize the legal basis for its claim, hence the action was removable. In *Caterpillar*, by contrast, the employees had sued under alleged individual employment agreements, which are creatures of state law, and even though federal law might preempt those claims, the preemption

question was purely a matter of defense. Complete preemption thus was not available. *See also Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22-26 (1983) (no complete preemption where State of California had no federal cause of action under ERISA).

Having knocked down a straw man by showing that the plaintiff's desired remedy need not be available, respondents argue that no general standards exist for complete preemption. They argue, instead, that each federal statute must be examined on its own terms to decide whether the preemptive effect is clear enough, broad enough and powerful enough to support removal. Respondents thus ignore *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), which teaches that a fundamental prerequisite to complete preemption is that Congress created an "exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Id.* at 8.

In effect, respondents argue that the complete preemption doctrine can be freed from its conceptual moorings in the theory that the federal cause of action supplants the state claim, and can be replaced with idiosyncratic judgments about the preemptive force of each statute. That is not, however, the mode of analysis followed by the great majority of circuits, and that clear conflict is what merits review by this Court.

Indeed, respondents are left to contend that the FRSA is so different from other preempting federal statutes that the rule of *Beneficial* need not apply. However, the FRSA is scarcely a candidate for expansion of the complete preemption doctrine. Many other federal statutes, such as the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), whose preemptive effect was at issue in *Bates v. Dow Agrosciences*, 544 U.S. 431 (2005), or the Federal Food, Drug, and Cosmetic Act of 1938 ("FDCA") and the Medical Device Amendments that were at

issue in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), or the National Labor Relations Act that was at issue in *Caterpillar*, establish far more comprehensive regulatory regimes over the matters that they cover than does the FRSA. And many preemption provisions, such as the Airline Deregulation Act ("ADA") at issue in *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), and the Employee Retirement Income Security Act at issue in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), are drafted far more broadly than the FRSA. After all, they both preempt any state law that "relates to" the preempted area, and contain far narrower savings clauses, than does the FRSA's preemption provision. But where Congress has not created an exclusive federal cause of action, state courts hear plaintiffs' state tort claims, even based on federal-law duties, and address any federal preemption defenses.

In *CSX Transport. v. Easterwood*, 507 U.S. 658, 664-665 (1993), the Court expressly distinguished the FRSA's preemption language from the broader "relates to" language in statutes such as the ADA, and found in the FRSA's preemption provisions "considerable solicitude" for the states' ability to provide a tort cause of action. This restricted view of FRSA preemption is consistent with the presumption against preemption where, as in tort litigation against railroads, states have a long tradition of protecting the health and safety of their citizens, and of providing tort remedies for injuries caused by negligence. See *Bates*, 544 U.S. at 449-50. Respondents' contention that the FRSA eliminates state tort claims and requires removal is at odds with these federalism concerns and with the plain language of the FRSA and *Easterwood*.[1]

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[1] Petitioners strenuously dispute respondents' arguments about the substantive preemptive effect of the FRSA. Section 20106

(continued...)

To sustain their defense of the holding below, respondents are compelled to call into question the many decisions of the courts of appeals that consistently hold that the ADA, ERISA, NLRA, and similar statutes do **not** provide for complete preemption, in part because they do not create federal

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[1](...continued)
preempts "State requirements," and focuses on whether states can adopt or continue in force "additional or more stringent" laws, regulations, or orders. 49 U.S.C. § 20106. Congress no more meant its creation of a rail safety regulatory program to prevent injured residents from seeking remedies for the injuries caused by railroad negligence, *Easterwood*, 507 U.S. at 664-665, than it meant to cut off all state tort remedies for dangerous chemicals, *Bates*, 544 U.S. at 446-452, defective medical devices, *Medtronic*, 518 U.S. at 486-489, or unsafe recreational boats. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-64 (2002).

Respondents mischaracterize *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (2000), to argue that this Court forbade state tort claims based on violations of the FRSA. In *Shanklin*, however, the railroad was undisputedly "fully compliant with federal standards," and the plaintiff argued that the railroad should be liable based upon more stringent standards than those approved by the federal and state governments. *Id.* at 350. Rejecting this argument, the Court held that the federally approved standard was preemptive. *Id.* at 359. Respondents omit critical language from their *Shanklin* quote and take the sentence out of context. Nothing in *Shanklin* indicates that state tort claims cannot be based upon FRSA violations. *See also* 49 U.S.C. § 20903 (setting evidentiary standards for parties who bring a "civil action for damages").

But as much as respondents would like to avoid it, the question presented is whether, as respondents contend, Congress meant to take the litigation of that preemption defense entirely out of the hands of the state courts by allowing defendants to choose federal court despite the absence of any federal cause of action that could have been filed in federal court in the first place.

causes of action that would supplant the state-law claim that is argued to be preempted. Petition at 13-16. Respondents effectively discard the well-established rule that a federal defense, even the defense of preemption, is not a basis for federal jurisdiction by removal or otherwise. *Franchise Tax Bd.*, 463 U.S. at 12.[2]

Respondents also urge that state courts should not hear tort claims potentially implicating FRSA standards because of the goal of uniformity in railroad regulation. As an initial matter, the primary and express goal of the FRSA is safety. *See* 49 U.S.C. § 20101. Allowing state tort claims to proceed in state courts furthers that express congressional goal. In fact, this Court rejected respondents' argument under a federal safety act with similar purposes, the Federal Boat Safety Act. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 70 (2002).

Departing from the Eighth Circuit's own reasoning, respondents also argue that *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg. Co.*, 545 U.S. 308 (2005), eliminated the need for an alternative federal cause of action. Although the court below asked for briefing on *Grable* at the same time that it sought briefing on complete preemption, it did not mention *Grable* in finding complete preemption. Nor did this Court, as respondents urge, expand the doctrine of complete preemption

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[2]In arguing that "the complete preemptive effect of railroad legislation" has long been recognized, Opp. at 11 n.4, respondents cite the Eighth Circuit's decision in *Deford v. Soo Line R.R. Co.*, 867 F.2d 1080 (1989), applying the doctrine of complete preemption to the Railway Labor Act ("RLA"). However, as shown in the Petition, at 16-17 & nn. 5 and 6, most circuits that have addressed the question flatly reject complete preemption by the RLA, precisely because that statute does not create an alternate cause of action. Respondents blithely ignore that line of authority.

in *Grable* based on the breadth of substantive preemption and "comprehensive regulation." Opp. at 22. Indeed, the mere comprehensiveness of a scheme of federal regulation does not establish even ordinary preemption, *Hillsborough County, Florida v. Automated Med. Lab.*, 471 U.S. 707, 716 (1985), much less complete preemption. Instead, the Court confined *Grable* to a "slim category" of cases that will not upset the balance of federalism in the courts and in which a federal issue is a necessary element of the plaintiff's claim for relief and, indeed, the only contested issue in the case. *Empire Healthchoice Assurance v. McVeigh*, — U.S. —, 126 S. Ct. 2121 (2006). Under respondents' theory of complete preemption, which involves fact-specific judgments about substantive preemption, the availability of federal removal jurisdiction will remain far from clear, and judicial resources will be diverted to wrangling over removal issues before the merits of the claims and defenses can even be reached.

Finally, respondents quote a brief excerpt from the Solicitor General's Brief in Opposition to the petition for a writ of certiorari in *Davis v. UAW*, No. 05-107, as supporting their opposition to review in this case. Opp. at 20-21, *quoting* SG Opp. at 19. But the Solicitor General's opposition to review in *Davis* was not based on the position that the existence of an alternate federal cause of action should never be considered, but only that this limit to the doctrine of complete preemption "should not be addressed in the abstract," in a case where that limitation had been neither raised nor addressed below. SG Opp. at 16-17. Moreover, *Davis* concerns a statute with respect to which no court of appeals has ever expressly considered the issue of complete preemption, and hence there was no conflict among the circuits. *Id.* at 16. These case-specific reasons for denying review in *Davis* do not apply here. The doctrinal limitation of complete preemption to those federal statutes that

create a cause of action was presented and expressly decided below, and has been addressed by several lower courts in disagreement with the Eighth Circuit. The FRSA does not create any cause of action that might be substituted for the state-law tort claims that were removed in this case. Accordingly, the Solicitor General's concerns about review in *Davis* simply do not apply here.

The Eighth Circuit wrongly treats jurisdictional complete preemption as the consequence of a preemption defense, without regard to whether the preempting statute also creates a cause of action. That is not merely a question of incorrect "application," *cf.* Opp. 17; it is the statement of the wrong rule, which most other courts of appeals expressly reject. The Court should grant review to ensure uniformity among the lower courts on that issue.

2. Certiorari Should Be Granted to Decide Whether the Preemption Defense Under the FRSA, 49 U.S.C. § 20106, Creates Federal Removal Jurisdiction Pursuant to the Doctrine of Complete Preemption.

Respondents seek to avoid review on the specific issue of removal jurisdiction under the FRSA based on a highly selective reading of the applicable lower court decisions. In fact, as the petition showed, there is widespread disagreement in the lower courts about this question presented as well.

Respondents downplay the *en banc* Fifth Circuit's rejection of removal in *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568 (2004), cited in the Petition at 18, on the ground that the court did not expressly address the issue of complete preemption. But that court did decide – in square conflict with the Eighth Circuit's decision here – that the defense of preemption by the FRSA does not create a basis for federal jurisdiction. That the federal question jurisdiction was not the main basis put forward by the railroad defendant for removal

does not make the conflict any less genuine. In order to present a veneer of lower court unanimity, respondents also ignore the Seventh Circuit's rejection of removal based on complete preemption in *Adkins v. Illinois Cent. R. Co.*, 326 F.3d 828 (2003), cited in the Petition at 19. As this Court noted, FRSA's preemption provision, 49 U.S.C. § 20106, applies to "any regulation 'adopted' by the Secretary" of Transportation relating to railroad safety. *Easterwood*, 507 U.S. at 643 n.4. Because the Locomotive Inspection Act at issue in *Adkins* is a railroad safety statute, *Adkins* conflicts with the ruling below.

And respondents ignore the several district court decisions refusing to allow removal based on FRSA preemption because the FRSA does not create an alternate federal cause of action. Pet. at 18-19. Although district court decisions do not ordinarily provide a ground for certiorari as compelling as court of appeals decisions, they do here, because remand decisions for lack of jurisdiction are not reviewable and effectively state the final rule in their jurisdictions. 28 U.S.C. § 1447(d). Thus, these cases further demonstrate a split in the lower courts.

Moreover, respondents' image of lower court unanimity is overstated. One of the two decisions that they cite as agreeing with the ruling below is from the Eighth Circuit itself. The other decision, *Rayner v. Smirl*, 873 F.2d 60 (4th Cir. 1989), comes from a circuit that has subsequently adopted the "creates a private right of action" requirement for the doctrine of complete preemption. *Lontz v. Tharp,* 413 F.3d 435, 442 (4th Cir. 2005). More fundamentally, *Rayner* involved a provision of the FRSA, the retaliatory discharge protection for whistle-blowing railroad employees, that **does** create a private right of action under federal law, 873 F.2d at 65-66, and hence *Rayner* is consistent with the position of the vast majority of circuits on the need for a cause of action in a statute alleged to provide for complete preemption. In sum, although the Eighth

Circuit's decisions on complete preemption are consistent with each other, they are at variance with the treatment of complete preemption in other lower courts, both with specific reference to the FRSA and as a general rule governing removal based on other allegedly preempting statutes. This Court should grant certiorari to resolve that conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

George G. Eck
Sarah A. Herman
Kristy L. Albrecht
Dorsey & Whitney LLP
51 North Broadway, Suite 402
P.O. Box 1344
Fargo, ND 58107-1344
(701) 235-6000

Collin P. Dobrovolny
Bryan L. Van Grinsven
McGee, Hankla, Backes
& Dobrovolny P.C.
15 - 2nd Avenue W.
Wells Fargo Bank Center
Suite 305
P.O. Box 998
Minot, ND 58702-0998
(701) 852-2544

Attorneys for Petitioners

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TOM LUNDEEN, *et al.*,

Petitioners,

vs.

CANADIAN PACIFIC RAILWAY COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* STATES OF NORTH DAKOTA, CALIFORNIA, INDIANA, IOWA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, OKLAHOMA, OREGON, SOUTH DAKOTA, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONERS

WAYNE STENEHJEM
Attorney General
of North Dakota
LYLE G. WITHAM*
DEAN J. HAAS
Assistant Attorneys General
500 North 9th Street
Bismarck, ND 58501-4509
(701) 328-3640
**Counsel of Record*

Counsel for Amici Curiae States

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BILL LOCKYER
Attorney General
State of California
MANUEL M. MEDEIROS
Solicitor General
OFFICE OF THE
ATTORNEY GENERAL
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244
(916) 323-1996

STEVE CARTER
Attorney General
State of Indiana
Indiana Governmental Ctr. S.
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201

TOM MILLER
Attorney General
State of Iowa
Iowa Attorney General's
Office
Des Moines, IA 50319
(515) 281-5191

J. JOSEPH CURRAN, JR.
Attorney General of
Maryland
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6300

MIKE HATCH
Attorney General of
Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King, Jr. Blvd.
St. Paul, MN 55155-1609
(651) 282-5721

JIM HOOD
Mississippi Attorney General
DEPARTMENT OF JUSTICE
P.O. Box 220
Jackson, MS 39205
(601) 359-3680

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri
Supreme Court Bldg.
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

MIKE MCGRATH
Attorney General of Montana
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

GEORGE J. CHANOS
Attorney General
State of Nevada
Nevada Dept. of Justice
100 North Carson Street
Carson City, NV 89701
(775) 684-1112

KELLY A. AYOTTE
Attorney General
of New Hampshire
33 Capitol Street
Concord, NH 03301
(603) 271-1202

W.A. DREW EDMONDSON
Attorney General
of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK
73105-4894
(405) 521-3921

HARDY MYERS
Attorney General
State of Oregon
1162 Court Street N.E.
Salem, OR 97301
(503) 378-6002

LAWRENCE E. LONG
Attorney General
State of South Dakota
1302 E. Hwy. 14, Suite 1
Pierre, SD 57501-8501
(605) 773-3215

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Comp.
East Office Bldg., Suite 320
Salt Lake City, UT
84114-2320
(801) 538-9600

ROBERT F. MCDONNELL
Attorney General
State of Virginia
WILLIAM E. THRO
State Solicitor General
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, VA 23219
(804) 786-2436

ROB MCKENNA
Attorney General
State of Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100
(360) 753-6200

DARRELL V. MCGRAW, JR.
Attorney General of
West Virginia
OFFICE OF ATTORNEY GENERAL
State Capitol, Rm. 26-E
Charleston, WV 25305
(304) 558-2021

PEGGY A. LAUTENSCHLAGER
Attorney General
State of Wisconsin
LINDA K. WELLS
Executive Staff Assistant
Division of Legal Services
WI DEPARTMENT OF JUSTICE
P.O. Box 7857
Madison, WI 53707-7857
(608) 266-7369

PATRICK J. CRANK
Wyoming Attorney General
CRISS CARLSON
Executive Assistant
ATTORNEY GENERAL'S OFFICE
123 State Capitol
Cheyenne, WY 82002
(307) 777-7841

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INTEREST OF THE *AMICI*

The *amici* States have an interest in preserving state court jurisdiction over state-law tort claims and other state-law causes of action, an exercise of state authority compromised by the Eighth Circuit's novel application of the "complete preemption" removal doctrine. Displacing state-court jurisdiction over state-law tort claims undercuts the traditional division of authority between state and federal courts and, more fundamentally, long-standing federalism principles. It is of particular concern here, where the federal statute relied on for removal – the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20101 *et seq.* – does not create a federal cause of action or remedy, and ultimately results in dismissal of the action.

State and federal courts are partners in fulfilling the country's judicial responsibilities. The well-pleaded complaint rule is a core component of the partnership and recognizes state-court competence. Broadening the complete-preemption doctrine as an exception to the well-pleaded complaint rule has "obvious federalism implications," Arthur R. Miller, *Artful Pleading: A Doctrine in Search of a Definition*, 76 Tex. L. Rev. 1781, 1797 (1998), and undermines the division of authority that the rule has preserved since enunciated in 1888. *See Louisville & N. R. R. Co. v. Mottley*, 211 U.S. 149, 154 (1908) (citing *Metcalf v. Watertown*, 128 U.S. 586 (1888), as the original well-pleaded complaint decision). State judicial systems are not only capable of handling tort claims, but have developed sophisticated processes and long-standing precedents for adjudicating negligence actions. And they do so efficiently. Further, they are capable and have developed a credible record applying federal law, including substantive preemption law. The *amici* have an abiding interest in ensuring

that this partnership is not unjustifiably revised to lessen the role of state courts.

The well-pleaded complaint rule has kept state-law causes of action in state court when substantive preemption defenses have been raised. Complete preemption removal jurisdiction has attached only in those rare circumstances when Congress wholly displaces the state-law cause of action with a federal cause of action, and also sets forth procedures and remedies governing that cause of action – *i.e.*, when the two-part test in *Beneficial National Bank v. Anderson*, 539 U.S. 1, 8 (2003), is satisfied. The Eighth's Circuit's decision eviscerates the well-pleaded complaint rule, ignores *Beneficial*'s two-part test, and thereby disrupts the federal-state balance in this area of the law.

REASONS FOR GRANTING THE PETITION

I. By disregarding the boundaries placed on the complete preemption doctrine in *Beneficial National Bank* – under which the doctrine applies only when two specific showings are made – the Eighth Circuit improperly broadened the doctrine's scope.

The Eighth Circuit removed 49 separate tort cases from state court by wrongly conflating substantive preemption with the "complete preemption" doctrine. Ordinary substantive preemption arises from the force of the Supremacy Clause, which declares that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; . . . any . . . Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

This Court has crafted a complex body of law governing when federal law displaces state law, and, along with the lower state and federal courts, addresses claims of express, implied, and field preemption with some frequency. *See, e.g., Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431 (2005); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). The "complete preemption" doctrine is a different creature altogether.

When a state-law claim is completely preempted, it is converted into a federal-law claim by operation of law, and therefore removable under the federal courts' "arising under" jurisdiction. *See Beneficial Nat'l Bank*, 539 U.S. at 8. As the Fourth Circuit has put it, "[c]omplete preemption is a 'jurisdictional doctrine,' while ordinary preemption simply declares the primacy of federal law, regardless of the forum or the claim." *Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005). Whereas myriad federal laws have been found to preempt state laws, this Court has so far found only three federal statutory provisions that *completely* preempt state law: Sections 85 and 86 of the National Bank Act, *see Beneficial Nat'l Bank*, 539 U.S. at 9-11; § 301 of the Labor Management Relations Act (LMRA), *see Avco Corp. v. Machinists*, 390 U.S. 557 (1968); and § 502 of ERISA, *see Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

By holding that the FRSA completely preempts state law – thereby converting petitioners' state-law claims into federal claims – based solely on its (mistaken) conclusion that the FRSA preempts petitioners' state actions in the ordinary sense, the Eighth Circuit has fundamentally misapplied the complete preemption doctrine. Unless this Court corrects the Eighth Circuit's improper expansion of the complete preemption doctrine, plaintiffs around the nation – including state Attorneys General – can expect to

expend significant time and resources litigating this removal issue.

A. The Eighth Circuit disregarded the narrow scope of the complete preemption doctrine, as set forth in *Beneficial National Bank*.

1. Congress has never authorized federal courts to hear claims under their "arising under" jurisdiction to the full extent permitted by the Constitution. In *Osborn v. Bank of the United States*, 22 U.S. 738, 822-23 (1824), the Court held that "arising under" jurisdiction within the meaning of Article III, § 2, exists when the resolution of a federal question might determine the outcome of the case. Yet because Article III's grant of judicial power to federal courts other than the Supreme Court is not self-executing, "it was not until the Judiciary Act of 1875 that Congress gave the federal courts general federal-question jurisdiction." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 807 (1986) (citing 28 U.S.C. § 1331, which contains the same "arising under" language as Article III, § 2). In a series of cases culminating in *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908), the Court held that a federal court lacks subject-matter jurisdiction under § 1331 if the plaintiff's complaint asserts on its face only state-law causes of action, regardless of whether the defendant asserts defenses (such as preemption) that are based on a potentially displacing federal law. Whether a civil action arises under a federal statute turns, in other words, on what is pleaded within the four corners of a plaintiff's complaint, and not on issues raised in the answer.

The removal statute – 28 U.S.C. § 1441 – limits removal jurisdiction to "any civil action" over which the

federal district courts "*have original jurisdiction*" except when "otherwise expressly provided" by Congress. The vast majority of cases removed under federal-question jurisdiction are cases "in which federal law creates the cause of action." *Merrell Dow*, 478 U.S. at 808. Consequently, a state-law claim "may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). In *Merrell Dow*, the Court confirmed that even when federal issues are elements of state-law causes of action, removal under federal-question jurisdiction is improper. 478 U.S. at 808.

A broader exercise of federal jurisdiction over state-law claims than allowed in *Merrell Dow* "would . . . have heralded a potentially enormous shift of traditionally state cases into federal courts." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 318-19 (2005) (citing *Restatement (Third) of Torts* § 14).[1] Accordingly, the ordinary rule is that state-law tort claims, such as the negligence claims brought by petitioners, are not removable merely because a substantive preemption defense is raised.

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[1] *Grable* established a "special and small category" of cases, *Empire Healthchoice Assur., Inc. v. McVeigh*, 126 S.Ct. 2121, 2137 (2006), that fall under § 1441 removal jurisdiction because a substantial question of federal law is a necessary element of a state-law claim and removal will not upset the balance of federal and state judicial responsibilities. As petitioners note (Pet. 12 n.2), that exception was not relied on by the Eighth Circuit and is not at issue in this case.

2. In *Beneficial,* this Court confirmed the existence of the complete preemption doctrine as a very narrow exception to that general rule. *Beneficial* held that an action asserting only state-law claims can be removed to federal court under the complete preemption doctrine when a two-part test is met: the federal statutes at issue provide "the exclusive cause of action for the claim asserted *and also* set forth procedures and remedies governing that cause of action." 539 U.S. at 8 (emphasis added). When those two conditions are met, the "cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Id.*

Rather than apply *Beneficial*, the court below relied on pre-*Beneficial* Eighth Circuit decisions that had adopted a markedly different approach. *See* Pet. App. at 20a-29a [447 F.3d at 611-14] (citing *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996); *Peters v. Union Pac. R.R.*, 80 F.3d 257 (8th Cir. 1996)). In doing so, the Eighth Circuit confused and conflated the complete-preemption doctrine with substantive preemption analysis. Thus, for example, the court observed that "Congressional intent is the 'ultimate touchstone' guiding preemption analysis" and that "[i]f the statute contains an express preemption clause, then the statutory construction should center on its plain meaning as the best evidence of Congress's preemptive intent." Pet. App. at 21a [447 F.3d at 611-12] (citations omitted).

Nowhere did the Eighth Circuit address the *Beneficial* factors that must be established to exercise complete-preemption removal jurisdiction. The court did not address whether the FRSA sections at issue provide "the exclusive cause of action for the claim asserted" (*Beneficial*'s first factor) or whether the FRSA sets forth "procedures and

remedies governing that cause of action" (*Beneficial*'s second factor). While the court noted that regulations adopted under the FRSA subject railroads to civil penalties for violations, Pet. App. at 27a [at 614], the court did not explain how such an administrative non-remedial provision satisfies either *Beneficial* factor. Nor could it, had it tried. In this Court's past complete preemption cases, private state-law causes of action were transformed by operation of law into private federal causes of action under the National Bank Act, the LMRA, or ERISA. No such transfer can occur under the FRSA, which does not create a private cause of action into which petitioners' state-law claims could be recast.

The decision of the Eighth Circuit broadly expands the limited circumstances defined by *Beneficial* for when a state-law claim may be removed to federal court under the complete-preemption doctrine. By conflating the complete-preemption doctrine with substantive preemption analysis, the Eighth Circuit threatens to cause what the limiting language from *Grable* was intended to prevent: a potentially enormous shift of traditionally state tort actions into federal courts based on federal preemption defenses, such as the 49 separate cases removed by the Eighth Circuit below.

B. The complete-preemption doctrine is a particularly poor fit for the FRSA.

The Eighth Circuit's failure to comprehend the complete-preemption doctrine was compounded by its failure to appreciate the substantive preemption analysis under the FRSA. In *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), this Court addressed preemption claims under

the FRSA for the first time. The Court observed that the FRSA preemption provision "displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses." *Id.* at 665. To resolve the particular preemption defenses asserted by the railroad, the Court therefore looked in detail at the specific facts supporting the tort claim, at the particular federal regulations purportedly relevant to the claim, at the state's specific use of federal funds, at "whether the preconditions for application of either [federal] regulation have been met," at the compatibility of concurrent state and federal rules, and at whether the state rules concerned local safety hazards. *Id.* at 665-75. The doctrine of complete preemption is wholly unsuited to such a regime. Removal occurs at the outset of a case. *See* 28 U.S.C. § 1446(b) (requiring "notice of removal of a civil action" to "be filed within thirty days after" service of process). It would make no sense for a federal district court to oversee exhaustive discovery and trial proceedings that might result in a determination that – because there is no preemption on the facts of the case – it has no jurisdiction, and the case must be remanded. This case is a prime illustration of the mismatch between the complete-preemption doctrine and the FRSA.

The National Transportation Safety Board concluded that the probable cause of the Minot derailment was "an ineffective Canadian Pacific Railway inspection and maintenance program that did not identify and replace cracked joint bars before they completely fractured and led to the breaking of the rail at the joint."[2] The Amended

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[2] *Track Safety Standards; Inspections of Joints in Continuous Welded Rail (CWR)*, 71 Fed. Reg. 59677, 59678-79 (Oct. 11, 2006).

Complaint (at ¶ XII) alleges that the track where the derailment occurred was made of 100-pound, continuous-welded rail (CWR); that the use of 100-pound CWR on a mainline track is rare; that the industry normally uses at least 115-pound rail for mainline CWR track; and that when the January 2002 derailment occurred, Canadian Pacific was maintaining approximately 14,000 miles of track, only approximately 65 miles of which consisted of 100-pound mainline CWR – most of it in use in the track near Minot, North Dakota, where this derailment occurred.

In addition, the complaint alleges that the derailment occurred at a "temporary joint" spliced into the CWR. *Id.*, ¶ XVIII. The railroad's own policy required temporary joints to be welded "as soon as possible after the rail is laid" and in no event later than 30 days. *Id.* Yet the "temporary" joint that failed in the 2002 derailment had been left in the track for about 20 months prior to the derailment, *id.*, and a track inspection conducted six months prior to the derailment revealed that the joint that failed was being subjected to high tensile forces. *Id.*, ¶ XVIII. Further, the complaint alleges that the railroad did not meet either its own internal requirements, or industry standards, for anchoring the track in a manner that protects joints from the strong tensile forces that occur when a track is used in cold temperatures like those that existed when the train derailed on January 18, 2002. *Id.*, ¶¶ XXV and XXVI. Finally, the railroad failed to inspect the track properly and left a cracked joint bar in the track for nearly a year. *Id.*, ¶ XXXI.

The FRSA regulations do not cover the salient facts that give rise to Petitioners' complaint. For example, they do not establish any weight requirements for track, as this

is an industry standard. They also do not state the standard for anchoring CWR at joints; again, this is an industry standard. They also do not address temporary joints in CWR and how much wear is allowed or how long they may remain in the track; plaintiffs' claims are again based upon industry and internal standards. Finally, the regulations (in their 1998 form) do not set inspection standards for CWR, instead asking railroads to come up with their own individual standards and submit them for review. Here, the railroad did not submit inspection policies to the Federal Railroad Administration (FRA), as required under 49 C.F.R. § 213.119, and none of the submissions were reviewed by the FRA prior to the derailment anyway. Thus, none of the claims are substantively preempted. At the very least, the determination of substantive preemption requires a detailed and fact-specific analysis. There is no basis to believe that Congress intended to create a regime under which a federal court must undertake such an analysis merely to determine its own jurisdiction – and under which a plaintiff suing a railroad must prevail twice to obtain relief, once in the federal courts (following removal), and once in the state courts (following remand).

There is still one more reason why the complete preemption doctrine is incompatible with the FRSA. This Court has repeatedly held the law disfavors leaving victims of negligence without a remedy for damages. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (it is "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"); *Medtronic Inc.*, 518 U.S. at 487 (rejecting a broad interpretation of a preemption statute because that would mean "Congress effectively

precluded state courts from affording consumers any protection from injuries resulting from a defective medical device," calling such a result "perverse" because it would grant "complete immunity from design defect liability"). By holding that the FRSA completely preempts state law – even though it does not create an exclusive federal cause of action of which plaintiffs can avail themselves – the Eighth Circuit decision runs afoul of those admonitions.

II. The Eighth Circuit's vast and erroneous expansion of the complete preemption doctrine has numerous negative consequences.

Under the Eighth Circuit approach to complete preemption – which essentially equates ordinary, substantive preemption with complete preemption – the doctrine of complete preemption will apply to countless lawsuits filed each year. The transformation of a state-law claim to a federal claim will become not the rare exception, but the rule when (in the federal court's view) substantive federal preemption is clear. Not only does the Eighth Circuit rule disregard the limits imposed on the doctrine in *Beneficial National Bank* and the prior decisions upon which it relied, but it will create numerous adverse consequences to the states, litigants, and the courts.

A. The Eighth Circuit's rule undermines practical and federalism values served by the well-pleaded complaint rule and the presumption against removal.

In *Gully v. First Nat'l Bank*, 299 U.S. 109, 118 (1936), Justice Cardozo emphasized the practical advantages of the well-pleaded complaint rule. "If we follow the ascent

far enough," he wrote, "countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself." The well-pleaded complaint rule is necessary, therefore, "[t]o set bounds to the pursuit. . . . We shall be lost in a maze if we put that compass by." *Id.* More concretely, plaintiffs may incorrectly anticipate defendants' defenses, the federal issue in a case may not become apparent until well after the litigation has proceeded in state court, or federal defenses may be "concocted purely to confer jurisdiction." Richard Posner, *The Federal Courts: Crisis and Reform* 190 (1985). The well-pleaded complaint rule prevents those contingencies from interfering with the orderly disposition of actions filed in state court. The Eighth Circuit's decision in this case, by carving out a broad exception to the well-pleaded complaint rule, increases the likelihood that state tort actions will be subject to these practical complications.

The Eighth Circuit's decision also undermines the federalism interests served by the well-pleaded complaint rule and the concomitant presumption against removal. The well-pleaded complaint rule apportions cases between the state courts and federal courts in a manner that leaves state courts with considerable responsibility for construing federal law. That delegation of power to state courts reflects the recognition by Congress and this Court that state courts are fully capable of discharging their constitutional mandate to construe federal law. *See Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976). It also reflects the state courts' historical role as primary arbiters of federal law. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78, n.4 (1981).

And because removal deprives state courts of jurisdiction over original state-law causes of action, this Court has recognized that removal of such claims raises significant federalism concerns that mandate strict construction of the removal statute: "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (citations and internal quotations omitted). For this reason, since 1887, the burden of establishing federal jurisdiction is on the party seeking removal. *See Carson v. Dunham,* 121 U.S. 421, 425 (1887).[3] The Eighth Circuit's expansion of the complete preemption doctrine distorts the federal-state balance by authorizing the removal to federal court of a broad category of cases that have traditionally been heard in state court.

B. The Eighth Circuit rule threatens removal of state-law actions commonly brought by state Attorneys General.

State Attorneys General play a leading role in protecting the interests of consumers and in enforcing environmental laws. Most consumer protection and environmental enforcement actions brought by state Attorneys General are instituted in state courts. The decision below seriously threatens the states' ability to maintain that forum of

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[3] *See also Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921) (citing *Carson*); *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995) (same); *Mulcahey v. Columbia Organic Chem. Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994) (same); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993) (same).

their choosing, even when the Attorneys General carefully limit their causes of action to state-law claims.

Commercial enterprises that run afoul of state consumer protection and environmental laws are subject to a significant number of federal statutes and regulations, and defendants in actions brought by states frequently assert the defense of preemption. Under the Eighth Circuit's standard, those defendants would be entitled to have a federal court resolve the preemption issue – and, should it find preemption, uphold removal of the action. As a consequence, actions brought under an Attorney General's core regulatory authority would, at the very least, face protracted litigation about whether state enforcement actions should be removed when preemption defenses are raised, as has occurred in the Eighth Circuit in cases arising out of derailments such as the Minot derailment.[4]

North Dakota, for example, settled the environmental violations caused by the Canadian Pacific Railway Company arising out of the Minot derailment through judgment entered under a consent decree. *State of North Dakota v. Canadian Pacific Ry. Co.* (N.D. Dist. Court, Ward Cty., Civ. no. 03-C-1003, July 15, 2003). That case was an enforcement action to address violations of North Dakota's water (N.D.C.C. ch. 61-28), hazardous waste (N.D.C.C. ch. 23-20.3), and air pollution (N.D.C.C. ch. 23-25) statutes, and their implementing rules, that were caused by the January 2002 derailment that gave rise to the case below. As with all states who assume primacy over

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[4] *In re Derailment Cases*, 416 F.3d 787 (8th Cir. 2005); *Mehl v. Canadian Pacific Ry., Ltd.*, 417 F. Supp. 2d 1104 (D.N.D. 2006); *Kalan Enterprises, LLC v. BNSF Ry. Co.*, 415 F. Supp. 2d 977 (D. Minn. 2006).

a Congressionally-enacted environmental program administered under EPA's oversight, North Dakota assumed these programs as part of a system of "cooperative federalism," which allows each state the choice of regulating an activity according to federal standards or having state law preempted by federal regulation. *See, e.g., New York v. U.S.*, 505 U.S. 144, 167 (1992) (disposal of radioactive waste). North Dakota's implementing rules, like most states, are based on federal rules and, in many places, incorporate the federal rules by reference. *See, e.g.,* N.D. Admin. Code §§ 33-16-02.1-08, 33-15-01-15 (cited in ¶ 12 of the stipulated facts in the *North Dakota* consent decree). *See also* N.D. Admin. Code ch. 33-16-02.1, North Dakota's water quality standards, incorporating EPA-Clean Water Act rules throughout. Any preemption defense that could be raised to the violation of any of these rules would be, under the Eighth Circuit's subsequent decision, arguably removal to federal court. At best, this would add time and expense, and would delay resolution of the case; at worst, it would remove all such cases to federal district court when a preemptive defense is raised by the defendant.

South Dakota ex rel. S.D. R.R. Auth. v. Burlington Northern & Santa Fe Ry. Co., 280 F. Supp. 2d 919 (D.S.D. 2003) (decided a month after this Court's decision in *Beneficial*) provides an example of application of the Eighth Circuit's rule. There, South Dakota filed its state-law causes of action for specific performance of a contract, tortious interference, and injunctive relief against the railroad in state district court. *Id.* at 923. In its ruling on the motion for remand, the federal district court agreed that South Dakota's "complaint does not, on its face, allege any claimed federal question for federal question jurisdiction." *Id.* at 925. Yet the district court declined to remand

based on an analysis under "the doctrine of 'complete preemption.'" Like the Eighth Circuit's analysis in the case below, the district court conflated complete preemption with substantive preemption, *id.* at 926-35, and denied South Dakota's motion based primarily on the "obstacle" form of substantive preemption. *Id.* at 929. South Dakota and Burlington Northern ultimately settled this case.

C. The Eighth Circuit rule would increase the time, and drive up the expense, of litigation.

"Jurisdictional rules should be clear." *Grable*, 545 U.S. at 321 (Thomas, J., concurring). The case below is a prime example of what happens when jurisdictional rules are unclear. Five years after the derailment occurred, jurisdiction remains the issue. There is no reason, moreover, to believe this is a rare occurrence. Complete preemption "may be the most misunderstood of all federal jurisdictional rules." Garrick B. Pursley, *Rationalizing Complete Preemption After Beneficial National Bank v. Anderson: A New Rule, A New Justification*, 54 Drake L. Rev. 371, 372 (2006). As described in the Petition for Writ of Certiorari, the lower courts are confused about the doctrine of complete preemption and are in disarray as to how the FRSA preemption provisions apply. *See* Pet. 13-24. The Eighth Circuit's decision is emblematic of the problem, misreading the complete-preemption doctrine and the FRSA preemption provision to create a result – the transformation of traditional state-law causes of actions against railroads into federal claims – that Congress could not possibly have intended. As defendants around the nation cite the Eighth Circuit opinion, it will undoubtedly

exacerbate the disarray and increase the toll that jurisdictional battles impose on litigants and courts.

Moreover, plaintiffs commonly choose state courts over federal courts for a reason. Tort cases typically revolve around facts and causation, not legal technicalities. State courts have a long history with those kinds of cases; they form a more central part of state court dockets than their federal counterparts. Federal courts are often located far from plaintiffs' residences. In addition, overburdened federal judges more often "quickly" dispose of cases by stringently controlling discovery, aggressively encouraging settlement, and more frequently granting summary judgment. *See* Steven Plitt, and Joshua D. Rogers, *Charting a Course for Federal Removal Through the Abstention Doctrine: A Titanic Experience in the Sargasso Sea of Jurisdictional Manipulation*, 56 DePaul L. Rev. 107, 107 (2006).

The Eighth Circuit's rule therefore creates a Hobson's choice for those tort victims who wish to try their state-law tort actions in state court. Under the Eighth Circuit rule, any uncertainty as to substantive preemption – a notoriously complicated issue – results in uncertainty as to whether claims are completely preempted. Because removal is authorized if even one of a plaintiff's claims is completely preempted, the plaintiff is left in the unenviable position of having to decide whether to omit *any* claim that is even arguably preempted (as a substantive matter) or running the risk of being forced to litigate in federal court. Federal statutes and regulations, if read broadly for complete removal effect, will do more than just dilute state court jurisdiction and state sovereign interests. They will increase the financial and human costs for accident victims. The well-pleaded complaint

rule, properly understood, protects against that problem. The Eighth Circuit's decision vastly overreads a narrow exception to that rule, and should be rejected by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully submitted.

WAYNE STENEHJEM
Attorney General
of North Dakota
LYLE G. WITHAM*
DEAN J. HAAS
Assistant Attorneys General
500 North 9th Street
Bismarck, ND 58501-4509
(701) 328-3640
Counsel of Record